

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,634

UNITED STATES, EX REL. THE SHOSHONE INDIAN
TRIBE AND THE ARAPAHOE INDIAN TRIBE OF
THE WIND RIVER RESERVATION IN WYOMING,
ROBERT N. HARRIS, A MEMBER OF THE SHO-
SHONE TRIBE, AND NELLIE F. SCOTT, A MEM-
BER OF THE ARAPAHOE TRIBE, FORT WASH-
AKIE, WYOMING,

Appellants,

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR,
Appellee.

**Appeal from an Order of the United States District Court
for the District of Columbia Dismissing the Complaint**

United States Court of Appeals
For the
District of Columbia Circuit

FILED

JAN 31 1957

Joseph W. Stewart

CLERK

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Filed November 10, 1955

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Civil Action No. 4987-55

UNITED STATES, EX REL. THE SHOSHONE INDIAN TRIBE AND
THE ARAPAHOE INDIAN TRIBE OF THE WIND RIVER RESERVA-
TION IN WYOMING, ROBERT N. HARRIS, A MEMBER OF THE
SHOSHONE TRIBE AND NELLIE F. SCOTT, A MEMBER OF THE
ARAPAHOE TRIBE, Fort Washakie, Wyoming, Plaintiffs

v.

DOUGLAS MCKAY, Secretary of the Interior, Defendant

COMPLAINT FOR REVIEW, FOR DECLARATORY JUDGMENT, AND
FOR INJUNCTIVE RELIEF

The plaintiffs for their complaint represent as follows:

1. The plaintiffs, Shoshone Indian Tribe and Arapahoe Indian Tribe, are American Indian Tribes, each with a tribal organization recognized by the Secretary of the Interior as authorized to represent and speak for the respective Tribes.

Plaintiff Robert N. Harris, is a member of the Shoshone Indian Tribe and Chairman of the Shoshone Business Council which is the duly elected governing body of the Shoshone Indian Tribe. Plaintiff Nellie F. Scott is a member of the Arapahoe Indian Tribe and Chairman of the Arapahoe Business Council which is the duly elected governing body of the Arapahoe Indian Tribe. Plaintiffs Harris and Scott are citizens of the United States and of the State of Wyoming, are residents of Wyoming and bring this suit in behalf of themselves and all members of their respective Tribes, similarly situated.

2. The defendant is the Secretary of the Interior, and

as such is charged with the management and administration of the property and affairs of the plaintiff Tribes, including their oil and gas lands, and with the management of the public lands of the United States, including the administration of the public oil and gas lands under the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, as amended.

3. The matter in controversy, exclusive of interest, exceeds \$3,000.00.

4. The jurisdiction of this Court is invoked under Title 11, Section 306 of the District of Columbia Code; and upon the ground that the matter in controversy arises under the laws of the United States.

5. The plaintiff Tribes are now, and at all times herein material were, the equitable owners of the oil and gas underlying about 161,520 acres of land located in the Riverton reclamation project in Fremont County, Wyoming within the bounds of the Wind River Indian Reservation as originally established. This 161,520 acres is the land in suit. It is more particularly described by metes and bounds in section 1 of the Act of August 15, 1953, 67 Stat. 592, and that description is incorporated herein by reference.

6. Under the Treaty of July 3, 1868, 15 Stat. 673, the Shoshone Indian Tribe was the full owner of the Wind River Reservation in Wyoming, including beneficial ownership of the timber and minerals on the reservation. In 1878 an undivided one-half interest in the Wind River Reservation was taken by the United States from the Shoshone Tribe for the benefit of the Arapahoe Tribe of Indians, and subsequent to 1878 the Shoshone Tribe and Arapahoe Tribe have been co-occupants and co-owners of the Wind River Reservation. *Shoshone Tribe v. United States*, 299 U.S. 476, 497-498; *United States v. Shoshone Tribe*, 304 U.S. 111, 116-119.

7. By agreement of April 21, 1904, ratified by the Act of March 3, 1905, 33 Stat. 1016, the Shoshone and Arapahoe Tribes ceded a portion of the Wind River Reservation to the United States in trust. The Tribes were not paid for the cession except that the agreement provided *inter alia* that the ceded lands should be disposed of by the United States "under the provisions of the homestead, town-site,

coal and mineral land laws * * * and the proceeds of the sales paid to the Tribes. (33 Stat. 1016.) The Tribes remained the equitable owners of the land until it was disposed of.

8. By the Act of August 21, 1916, 39 Stat. 519, special provision was made for the disposition of oil and gas on the "ceded" land. The Secretary of the Interior was authorized to lease, for the production of oil and gas, lands within the ceded portion of the Reservation "under such terms and conditions as shall be by him prescribed." The proceeds and royalties from such leases were directed to be "applied for the use and benefit of said tribe * * *." Shortly after the approval of the 1916 Act the Secretary promulgated regulations to govern oil and gas leasing on the "ceded" land, and at all times herein pertinent, those regulations have required such lands within the ceded portion of the Reservation to be offered for lease on a competitive basis to the "highest responsible bidder." 25 CFR 192, 192.4.

9. Thereafter about 332,000 acres of the "ceded" lands were reserved for reclamation purposes and, under authority of the Act of June 5, 1920, 41 Stat. 874, 915, the Riverton project, a federal reclamation project, was constructed on the "ceded" lands.

10. As of mid-1953 there remained within the Riverton reclamation project about 161,520 acres of ceded land for which the Tribes had received no compensation. The Tribes were the equitable owners of every interest in those lands, including the minerals. Under applicable law, public lands, but not "ceded" Indian lands such as the 161,520 acres, could be sold to reclamation project entrymen or landowners. To permit the sale of these lands, exclusive of minerals, the United States negotiated an agreement with the Tribes for the sale of the surface only of the 161,520 acres for \$1,009,500.00, representing the value of the land for agriculture and grazing at \$6.25 per acre, but not including minerals.

11. By the Act of August 15, 1953, c. 509, 67 Stat. 592 (Public Law 284, 83rd Congress, 1st Session) the sum of \$1,009,500.00 was authorized for payment to the Tribes. The Act provided as follows:

Section 1 * * * [said sum of \$1,009,500.00] shall be deemed to constitute full, complete, and final compensation, except as provided in section 5 of this Act, for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian Tribes and their members of, in and to the lands * * * [here follows a 20-page description of the 161,520 acres].

Section 2. Subject only to the existing rights and interests which are not extinguished and terminated by this Act, all unentered and vacant lands within the area described in section 1 hereof, are hereby restored to the public domain for administration, use, occupancy, and disposal under the reclamation and public land laws of the United States: *Provided*, That the sale or other disposition of such lands shall be at rates and upon terms and conditions approved by the Secretary of the Interior: *Provided further*, That the average price of all such lands disposed of by sale shall be not less than \$6.25 per acre.

* * * * *

Section 5. * * * The United States shall deposit in the Treasury of the United States to the credit of said tribes, * * * 90 per centum of the gross receipts of the United States, as they are received from time to time, from all leases, bonuses, royalties, or other proceeds derived under the mining and mineral-leasing laws of the United States from any and all lands in which all rights and interests of the tribes are terminated and extinguished by the terms and conditions of section 1 of this Act and which are embraced within the boundaries of the tract described in said section 1. Notwithstanding any other provision of law the remaining 10 per centum of such gross receipts shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts.

12. For 37 years following the enactment of the Act of 1916 and up to the Act of August 15, 1953, it was the established and consistent practice of the Department of the Interior to administer the ceded portion of the reservation,

including the 161,520 acres, under the Act of 1916 and the regulations issued pursuant thereto as the exclusive authority for the issuance of oil and gas leases on the ceded lands. *Florence E. Gallivan*, 60 I.D. (Interior Decisions) 417 (1950). The leasing was administered by the Bureau of Indian Affairs, charged by the Secretary with administration of oil and gas matters on the lands of plaintiff Tribes. Numerous leases were issued during this period, all after first calling for competitive bids and all at a rental of \$1.25 per acre per year. From March 29, 1949 to March 30, 1953, oil and gas leases covering only 4,400 acres of the 161,520 acres brought in \$664,171.00 in bonuses, plus \$1.25 per acre per year in rent, plus the usual royalty. In the month of March 1953 alone, preceding the Act of August 15, 1953 leases covering only 2,860 acres of the 161,520 brought \$494,167.00 in bonuses.

13. Subsequent to the Act of August 15, 1953, the Bureau of Land Management without prior notice to, or affording plaintiff Tribes an opportunity to be heard, and without, according to plaintiffs' information and belief, consulting or advising with the Bureau of Indian Affairs, commenced administering the oil and gas leasing on said 161,520 acres without regard to the Act of 1916 or the regulations issued pursuant thereto. Contrary to the Act of August 15, 1953, the Bureau of Land Management treated the oil and gas as if it were public property of the United States and entertained applications for oil and gas leases and granted oil and gas leases covering the 161,520 acres under the purported authority of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended. Over 93 leases have thus been issued and plaintiff is informed that practically all the land is covered by such leases invalidly issued.

14. The action of the defendant in receiving applications and granting leases under the Mineral Leasing Act of 1920 governing the general leasing of public lands, instead of under the 1916 Act governing the particular "ceded" land in suit, was unlawful and beyond the authority conferred on the Secretary and constituted a violation of his trust responsibilities and obligation to the plaintiffs as wards of the United States.

15. The action of the Secretary in issuing leases cover-

ing the oil and gas in the 161,520 acres as if the oil and gas were public property of the United States has resulted in great damage to the plaintiffs, in that (a) under the Mineral Leasing Act governing public lands, the leases are non-competitive and plaintiffs receive no bonuses, whereas under the Act of 1916 and regulations issued pursuant thereto, substantial bonuses have been paid for comparable lands within the same project for the right to oil and gas leases (See paragraph 13 above); (b) the leases issued under the Mineral Leasing Act call for a rental payment averaging 20¢ per acre per year over a five year term, whereas under the 1916 Act and its regulations the leases call for a rental of \$1.25 per acre per year and (c) other advantages and benefits to the plaintiff Tribes under the 1916 Act.

16. By letters of March 23, 1955 from counsel for the Tribes, this situation was called to the attention of the Secretary with the request that the Bureau of Land Management be directed to take no steps looking towards the sale or lease of oil, gas or other minerals on this land, to suspend all action on pending applications, to approve no assignments of leases already issued and to authorize no drilling.

The request was rejected by letter of April 22, 1955 from the Department of the Interior. A copy of each of the letters, marked Exhibits A, B and C, respectively, is attached hereto and made a part of this complaint.

17. On May 5, 1955, plaintiffs commenced administrative proceedings before the Department of the Interior, requesting that all leases covering lands described in the Act of August 15, 1953 which were issued under the Mineral Leasing Act of 1920, be cancelled and that all pending applicants seeking leases under the 1920 Act be rejected.

18. The Secretary of the Interior assumed jurisdiction of the protest and by opinion of September 22, 1955 (Wyoming 024038 et al.) rejected the protest in its entirety. Plaintiffs have exhausted their administrative remedies.

19. Plaintiffs are informed and believe that the defendant is planning to approve assignments of the leases and to grant authorizations to drill, thus changing the *status quo* and defeating the jurisdiction of this Court.

WHEREFORE, plaintiffs pray:

1. That the defendant be restrained and enjoined *pendente lite* from approving assignments of any oil and gas lease issued pursuant to the Mineral Leasing Act of February 25, 1920 to the extent that any such lease covers any part of the 161,520 acres in suit, or from granting authority to drill on any part of said land under any such lease or from doing any other acts which will change or affect the rights of these plaintiffs pending the determination of this cause.

2. That the Court review the action of the defendant in accordance with the provisions of section 10 of the Administrative Procedure Act (5 U.S.C. 1009).

3. That it be declared and adjudged that the land described in section 1 of the Act of August 15, 1953, 67 Stat. 592 is not subject to oil and gas leasing under the Mineral Leasing Act of February 25, 1920, as amended, but is subject to oil and gas leasing under the Act of August 21, 1916, 39 Stat. 519, only.

4. That it be declared and adjudged that all leases issued pursuant to the Mineral Leasing Act of February 25, 1920, as amended, to the extent that they cover any part of the 161,520 acres in suit were issued in violation of law and beyond the power of the Secretary, and should be set aside and cancelled and that the defendant be directed to cancel all such leases.

5. That defendant pay to plaintiff the costs of this action.

6. That plaintiffs have such other and further relief as is just and equitable.

(S.) MARVIN J. SONOSKY,
KING, NOBLE AND SONOSKY,
1028 Connecticut Avenue, N. W.,
Washington 6, D. C.
Attorney for the Shoshone Tribe.

(S.) GLEN A. WILKINSON,
WILKINSON, BOYDEN, CRAGUN & BARKER,
744 Jackson Place,
Washington 6, D. C.,
Attorney for the Arapahoe Tribe.

EXHIBIT "A" OF COMPLAINT

Law Offices
King, Noble and Sonosky
1028 Connecticut Avenue, N. W.
Washington 6, D. C.

March 23, 1955

Honorable Douglas McKay
Secretary of the Interior
Washington 25, D. C.

Dear Mr. Secretary:

This letter is written on behalf of the Shoshone Tribe of the Wind River Reservation in Wyoming with respect to the rights of the Tribe to 90% of the proceeds from the minerals as specified in section 5 of the Act of August 15, 1953, c. 509, 67 Stat. 592 (Public Law 284, 83d Cong., 1st sess.).

Public Law 284 provides for compensation for 161,500 acres of land relinquished by the Indians to the United States for reclamation purposes. The rights of the Indians to the surface and to the minerals were extinguished. The Government paid \$1,009,500 for the surface rights and in satisfaction of certain claims against the United States arising out of the Government's use of the land over a period of 33 years. The Indians did not sell and the United States did not buy the minerals. *The \$1,009,500 did not include payment for the mineral rights.* This is made clear in section 1 of the Act which specifies that the \$1,009,500 "shall be deemed to constitute full, complete and final compensation, *except as provided in section 5 of this Act* * * *."

Section 5 of the Act directed that the Indians should be credited with 90% of the "gross receipts of the United States, as they are received from time to time, from all leases, bonuses, royalties, or other proceeds derived under the mining and mineral-leasing laws of the United States from" the 161,500 acres of ceded land.

The Department was aware that before the enactment of Public Law 284 nine oil and gas leases had been issued covering about 5100 acres of the 161,500 acres relinquished

under Public Law 284. Those leases were issued under the regulations promulgated pursuant to the Act of August 21, 1916, 39 Stat. 519 (25 CFR 192 et seq.) and were offered at competitive sale to the highest bidder. As a result the nine leases set out below brought over \$667,000 in bonuses or an average of over \$130 per acre.

<i>Lease No.</i>	<i>Acres</i>	<i>Bonus</i>
14-20-258-52	590	\$30,276
14-20-258-50	40	6,066
14-20-258-49	2260	430,199
14-20-258-48	670	30,626
14-20-258-42	980	160,004
I-96-Ind.-78-31	120	3,660
I-96-Ind.-78-32	160	1,240
I-96-Ind.-77-38	160	3,600
I-96-Ind.-77-39	120	1,500
	5100	\$667,171

There was no intent by the Indians to surrender valuable bonuses or in any way to diminish the benefits from minerals under the laws governing tribal lands. Certainly there was no intent on the part of the United States to deprive the Indians of this income without consideration. The real intent of the parties was that for 10% of the proceeds the United States was to administer minerals on the ceded lands under Public Law 284 as had been done before the enactment of that Act. This meant calling for competitive bids for oil and gas leases with the attendant bonuses divided 90% to the Indians and 10% to the Government. It meant that uranium lands would similarly be leased with the royalties divided 90% and 10%. The legislative history makes clear that it was the surface only which was restored to the public domain under section 2 of the Act. (S. Rept. 644, 83d Cong., 1st sess., (1953) pp. 9, 10; H. Rept. 269, 83d Cong., 1st sess., (1953), pp. 2, 4.)

This intent has not been carried out. The minerals are being administered by the Bureau of Land Management under the laws governing public lands. (See Instructions dated December 8, 1953 to Region III and Memorandum of January 13, 1954 from Director of the Minerals Branch

to District Office at Cheyenne.) Our information is that numerous oil and gas leases have been issued without calling for bids. Moreover, many applications for such leases are pending. In addition we are advised some uranium claims have been staked out on the ground.

This means the Tribes are being deprived of all bonuses on oil and gas leases and will receive no income whatsoever from uranium leases.

Grievous error has been committed in thus dealing with the minerals. Steps must be taken to undo the damage. For the future, special regulations are required to govern the disposition of minerals on these lands. Those regulations should be conformable to those in 25 CFR 192 for oil and gas and to those governing the leasing of tribal lands valuable for uranium or other minerals. Pending corrective action and the issuance of appropriate regulations, we respectfully urge that the Bureau of Land Management be directed to take no steps looking towards the sale or lease of oil, gas or other minerals on this land and to suspend all action on pending applications. No assignments of leases should be approved and no drilling authorized. Steps should be taken looking towards the cancellation of all oil and gas leases issued subsequent to the enactment of Public Law 284, since there was no authority under that Act to waive competitive sales. Similarly, applicants for uranium leases or permits should be notified their claims are invalid.

Very truly yours,

MARVIN J. SONOSKY.

cc:

Solicitor,
Commissioner of Indian Affairs,
Administrator for Land Management,
Commissioner of Reclamation,
Director Geological Survey.

EXHIBIT "B" OF COMPLAINT

Wilkinson, Boyden, Cragun & Barker
Law Offices

744 Jackson Place
Washington 6, D. C.
National 8-1114
March 23, 1955.

Honorable Douglas McKay
Secretary of the Interior
Washington, 25 D. C.

My dear Mr. Secretary:

This letter is written on behalf of the Arapahoe Tribe of the Wind River Reservation in Wyoming, for whom we are counsel. The matter involved is the interest of the Arapahoe Tribe in proceeds from leases, bonuses, royalties or other proceeds derived under the mining and mineral-leasing laws of the United States from lands ceded pursuant to the Acts of August 15, 1953, c. 509, 67 Stat. 592 (Public Law 284, 83d Cong.), and of August 21, 1916, c. 363, 39 Stat. 519.

Marvin J. Sonosky, Esq., of Messrs. King, Noble & Sonosky, on behalf of the Shoshone Tribe of the same reservation, has written you under equal date to request for the future special regulations to govern disposition of minerals on the 161,500 acres of lands ceded, to be conformable to those in 25 C.F.R. § 192 for oil and gas and to those governing leasing of tribal lands valuable for uranium or other minerals. Pending action on the issuance of appropriate regulations, he requests that the Bureau of Land Management take no steps looking toward the sale or lease of oil, gas or other minerals on this land and to suspend all action on pending applications, including approval of assignments, or drillings. He requests that steps be taken looking to cancellation of all oil and gas leases issued subsequent to the enactment of Public Law 284, 83d Cong., and that applicants for uranium leases or permits be notified that their claims are invalid.

On behalf of the Arapahoe Tribe we join with Mr. Sonosky in the relief requested. We call attention to the fact

that under Section 5 of the Act of August 15, 1953, it is provided that notwithstanding any other provision of law the Shoshones and Arapahoes should be credited with 90% of the gross receipts by the United States as they are received from time to time from all leases, bonuses, royalties, or other proceeds derived under the mining and mineral-leasing laws of the United States from any and all lands in which all rights and interests of the Tribes are terminated and extinguished by the terms and conditions of Section 1 of that Act. The legislative history shows that the surface rights were compensated in the appropriation authorized by that Act (\$1,009,500), and that mineral rights—known to be valuable—were compensated by letting the Tribes have the actual proceeds of those rights minus 10% to the United States for administration.

As a result, these two tribes are the *cestuis que trust* of the mineral rights in the ceded area. It has been repeatedly held that an agreement on the part of the United States to dispose of lands under circumstances where it is to hold the proceeds for the Indian tribe which had owned them, establishes the United States as a trustee quite apart from whether the lands are thereafter to be held as "public lands" for the sake of disposal. *Confederated Bands of Ute Indians v. United States*, (1943), 100 C. Cls. 413, 425, 428, 431-432; same case (1948) 112 C. Cls. 123, 130-131; *United States v. Brindle*, 110 U.S. 688, 693; *Minnesota v. Hitchcock*, 185 U.S. 373, 394; *United States v. Mille Lac Band*, 229 U.S. 498, 508-509; *Ash Sheep Co. v. United States*, 252 U.S. 159, 164-165.

If we consider what duty the United States owes these tribes as trustee, it must be apparent it is not to turn what had been a profitable ownership of mineral rights—compare the two-thirds of a million dollars which Mr. Sonosky refers to with the trifling proceeds since the Act of August 15, 1953—into a non-productive or give-away program. The Act did not authorize any abandonment of the mineral-leasing laws then applicable to Indian reservations. If the Bureau of Land Management has proceeded only under the Mineral Leasing Act of 1920 as amended, it has overlooked the acts relating to leasing of Indian lands, and in particular the Act (covering mineral leases upon this very

reservation) of August 21, 1916, 39 Stat. 519, and regulations promulgated thereunder, 25 C.F.R. § 192 and following, which were in the minds of the Indians, the Indian Office, and of the Congress when this Act of 1953 was adopted. Adequate provision was made by the 1953 Act for secretarial control to vindicate the trust either under Section 2 of that Act which provided "That the sale or other disposition of such lands shall be at rates and upon terms and conditions approved by the Secretary of the Interior" or, Section 7, "The Secretary of the Interior is authorized to perform any and all acts to carry out the provisions and purposes of this act."

In the light of the operations which are actually being carried out under this Act, we must insist on behalf of the Arapahoe Tribe that the further disposition of these lands without proper payment to the Indians be halted, and that the Department recapture the situation as it existed in August, 1953, and thereafter adhere to the purpose and intent of that Act establishing the trust relationship of the United States.

Very respectfully yours,

WILKINSON, BOYDEN, CRAGUN & BARKER,
By: JOHN W. CRAGUN.

EXHIBIT "C" OF COMPLAINT

United States
Department of the Interior
Office of the Secretary
Washington 25, D. C.

April 22, 1955

My dear Mr. Sonosky:

This is in reply to your letter of March 23, 1955, to Secretary McKay regarding the departmental administration of the Act of August 15, 1953 (67 Stat. 592), otherwise known as Public Law 284, 83rd Congress, 1st session. In particular you have questioned the Department's authority under the act to dispose of the minerals in the lands described therein under the Mineral Leasing and Mining Laws. You have asked that this Department suspend all operations on the leases which have been issued and that it stop issuing any further leases.

We have given extensive consideration to the points mentioned in your letter and to those pointed out in the letter of March 23, from Mr. John W. Cragun of Wilkinson, Boyden, Cragun & Barker, Washington, D.C., representing the Arapahoe Tribe. We have done additional research into the legislative history of the Act and into the facts of the situation involved. It appears that 93 non-competitive leases have issued on portions of the described property since the passage of the Act.

As you know, these leases were issued following a memorandum of instructions dated December 8, 1953, from Acting Director William Pincus of the Bureau of Land Management, to the Regional Administrator, Region III of that Bureau. On January 13, 1954, Mr. L. E. Hoffman, Chief of the Division of Minerals, further informed the Manager of the Land Office at Cheyenne that if the noncompetitive oil and gas lease offers then on file complied with the instructions and regulations under the Mineral Leasing Act of 1920, leases should issue at the earliest opportunity. It is our understanding that these directives from the Bureau of Land Management were complied with and that leases were issued in accordance therewith.

Nothing appears in the Act or in the legislative history thereof which would indicate that the leases as issued are invalid or that Public Law 284 was incorrectly construed by the Bureau of Land Management. The leases are presumed to have been validly issued, and to constitute binding contracts which cannot be arbitrarily cancelled. The powers of the Department to cancel such leases is limited to those cases where *the lessees* have violated some provision of law or regulations, or the terms of the leases (L.N. Hagood, 60 I.D. 462), or where the leases were issued in violation of law or regulation. *Annie L. Hill, et al. v. E. A. Culbertson*, A-26150-26157 (August 13, 1951). In these cases no such violation by the lessees have been alleged and we are unable to conclude that the leases were issued in violation of any law or regulation.

You can readily understand that the Department would be unwilling to cast a cloud on all its lease contracts by giving the impression that such leases may be subject to administrative cancellation merely upon a general protest as to their validity. A cancellation of the leases under consideration at this time would, in effect, be an *ex parte* Departmental determination that they were invalidly issued under the Act. That is not our present position and for this reason we are unable to comply with your request for cancellation. Although we recognize that the Department is under a duty to exercise a high degree of care in matters pertaining to Indians, we must also recognize the rights of those with whom we have entered into lease contracts which we must presume to be validly issued.

During your informal conversations with representatives of the Solicitor's Office, you have inquired whether the Department would consider ordering a suspension of all further action and operations in connection with these leases. With regard to this question we have concluded that there is no provision of law, regulation, or the lease under which the Secretary could arbitrarily deprive a lessee of a portion of his lease term. Naturally, the Department would be unwilling to take any such action unless a valid legal basis existed for the order.

Careful consideration has also been given to your request for suspension of all pending applications for oil and

gas leases in these areas. However, we feel that to take such action would be to indefinitely deprive the Indians of the revenues from the leases, would delay development of the area, and the recovery of royalties. Such action by the Department would therefore conflict with the duties imposed by law on the Secretary under Public Law 284. For this reason we are also obliged to deny your request for a suspension of applications.

Sincerely yours,

(Sgd.) ORME LEWIS,
Assistant Secretary of the Interior.

Mr. MARVIN J. SONOSKY, Esq.,
Messrs. KING, NOBLE AND SONOSKY,
1028 Connecticut Avenue, N.W.
Washington 6, D. C.

* * * * *

Filed January 12, 1956

DEFENDANT'S MOTION TO DISMISS

The defendant moves to dismiss on the following grounds:

1. The complaint fails to state a claim upon which relief can be granted.
2. The lessees to whom the allegedly invalid leases have been issued are indispensable parties.

(S.) PERRY W. MORTON,
Assistant Attorney General,
Lands Division

(S.) THOS. L. McKEVITT,
Attorney, Department of Justice,
Room 2127, Department of Justice Building,
Washington, D. C.
Attorneys for Defendant.

* * * * *

Filed June 21, 1956

MEMORANDUM OPINION

Motion to dismiss by defendant granted.

By the Act of August 15, 1953, 67 Stat. 592, the lands in question became part of the public domain, subject for administration, use, occupancy and disposal under the reclamation and public land laws of the United States.

Since it appears that these lands are not within a presently known geologic structure, obviously the only appraisal which could be made was that of their surface use value. Congress, by the Act, provided that even though the Indians had parted under the terms of the statute with *all* of their right, title, estate and interest including minerals, gas and oil, etc., nevertheless ". . . 90 per centum of the gross receipts of the United States as they are received from time to time, from all leases, bonuses, royalties, or other proceeds derived under the mining and mineral leasing laws of the United States from any and all lands in which all rights and interests of the tribes are terminated and extinguished . . ." are to be deposited in the Treasury to the credit of the tribes.

As noted above, Congress by legislation has placed the lands within the public domain. That being the fact, the special leasing Act of August 21, 1916 no longer applies. The only beneficial interest outstanding in the Indians, if indeed it can be called such, is that delineated by the statute, namely, that of an interest in 90 per cent of the receipts received from time to time, from leases, bonuses, royalties or other proceeds.

True, it is the rule that in construing statutes relating to Indians, a liberal construction in their favor is to be indulged in, but this rule of construction cannot be invoked for the purpose of overcoming the plain meaning of plain words used in such legislative enactments, and Courts have no power to remake or redraft them. *United States v. First National Bank*, 234 U.S. 245, at 260.

Order accordingly.

(S.) MATTHEW F. McGUIRE,
United States District Judge.

June 21, 1956.

Filed June 28, 1956

MOTION FOR RECONSIDERATION OF
ORDER DISMISSING COMPLAINT

Plaintiffs move the Court to reconsider its decision to dismiss the complaint.

The motion is based on two primary grounds:

First, this is not an appropriate case for dismissal without joining issue and without review of the administrative record. The relationship between the Tribes, the United States and the Secretary of the Interior, as well as the unique position of the Secretary representing both buyer (United States) and sellers (Tribes) in the transaction in question, calls for full examination of the administrative record.

Second, if there is doubt as to whether the \$1,009,500 consideration included the \$6.25 per acre surface only or whether it also included the \$150 per acre bonus value on the oil and gas deposits, the case should not be dismissed without joining issue and producing the administrative record.

A memorandum and statement of points and authorities is attached.

Respectfully submitted,

(S) MARVIN J. SONOSKY,
1028 Connecticut Avenue, N. W.,
Washington 6, D. C.,
*Attorney of the Shoshone
Tribe and Robert N. Harris*

(S) GLEN A. WILKINSON,
744 Jackson Place, N. W.,
Washington 6, D. C.,
*Attorney for the Arapahoe
Tribe and Nellie F. Scott*

* * * * *

Filed September 6, 1956

JUDGMENT

This matter having come on for hearing on the motion to dismiss filed by defendant's predecessor, Douglas McKay, and it appearing that the defendant Fred A. Seaton has been substituted as defendant in the place of said Douglas McKay's interim successor, Clarence A. Davis, Acting Secretary of the Interior, and the court having heard argument of counsel and being fully advised,

It is ordered that the motion to dismiss be sustained and that the complaint be and hereby is dismissed.

Dated this 6th day of September, 1956.

(S.) MATTHEW F. MCGUIRE,
Judge,
United States District Court.

Filed November 1, 1956

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs in this case hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order dismissing the complaint entered in this case on September 6, 1956.

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* * * * *

CIVIL DOCKET, UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

1955 Deposit for cost by

November 10. Complaint, appearance, Exhibits "A", "B", "C". filed.

November 10. Summons, copies (1) and copies (1) of Complaint issued; ser. 11/16/55; Atty. Gen. Ser. 11/16/55; U. S. Atty. ser. 11/15/55; filed.

November 10. Motion of Pltfs. for Preliminary Injunction, P&A.; served 11/16/55; Atty. Gen. ser. 11/16/55; U. S. Atty. ser. 11/15/55; M. C. 11/21/55 filed.

November 25. Points and Authority of deft. in opposition to motion for preliminary injunction; appearance of Perry W. Morton, Asst. Atty. Gen. & Thos. L. McKevitt, Atty.; c/m 11/25/55; exhibit; filed.

1956

January 12. Motion of deft. to dismiss; P&A; appendix B; c/m 1/12/56; M.C. 1/12/56 filed.

January 18. Motion of pltf for extension of time to oppose motion to dismiss to & including 3-15-56, P&A, c/m 1-18-56; M.C. 2/1/56 filed.

January 24. Deft's opposition to motion for extension of time within which to oppose motion to dismiss; c/m 1/24/56 filed.

February 28. Motion of pltf. to extend time to oppose motion to dismiss, c/m 2-27-56 P&A, M.C. 2-28-56 filed.

March 14. Order granting pltfs. to & including 3-18-56 to file opposition to motion to dismiss. McLaughlin, J. (N).

March 19. Opposition of pltfs. to motion to dismiss; c/m 3/16/56; appendix A.; M.C. 3/19/56; filed.

May 8. Defendants reply memo. of P&A; in support of motion to dismiss; c/s 5-8-56 filed.

May 9. Motion of deft. to dismiss argued and submitted. Rptd. R. Minier. McGuire, J.

May 9. Order substituting Clarence A. Davis as party deft. in place of Douglas McKay. (N) McGuire, J.

May 15. Supplemental brief of pltfs; c/m 5-15-56 filed.

June 21. Memo opinion granting defts. motion to dismiss (N). McGuire, J.

1956

June 28. Motion of pltf. for reconsideration c/m 6-27-56 P&A; M.C. Filed.

July 3. Opposition of deft. to motion for reconsideration of order dismissing complt; c/m 7-3-56 filed.

July 12. Consent order substituting Fred Seaton as party deft. (N) McGarraghy, J.

September 6. Order dismissing complaint. (N) McGuire, J.

November 1. Notice of appeal of pltf.; c/m 11-1-56; deposit by pltf. \$5.00; P&A; c/m 10, filed.

November 1. Designation of record on appeal; c/m 11-1-56, filed.

(3257-3)

135
No. 13,634 *United States Court of Appeals*
For the
District of Columbia Circuit

IN THE **FILED** JAN 28 1957

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT **CLERK**

UNITED STATES, EX REL. THE SHOSHONE INDIAN
TRIBE AND THE ARAPAHOE INDIAN TRIBE OF
THE WIND RIVER RESERVATION IN WYOMING,
ROBERT N. HARRIS, A MEMBER OF THE SHO-
SHONE TRIBE AND NELLIE F. SCOTT, A MEM-
BER OF THE ARAPAHOE TRIBE, FORT WASH-
AKIE, WYOMING, *Appellants,*

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR,
Appellee

Appeal from an Order of the United States District Court
for the District of Columbia Dismissing the Complaint

BRIEF FOR THE APPELLANTS

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RECEIVED

JAN 23 1957

CLERK OF THE UNITED
STATES COURT OF APPEALS

Question Presented

Where Indian tribes retain the right to 90% of the proceeds from oil and gas underlying ceded reservation land, whether the oil and gas deposits may be leased without competitive bid under the Mineral Leasing Act of 1920 (30 U.S.C. 181) applicable to lands "owned by the United States" or whether such deposits must be offered for lease by competitive bidding under the statutes governing Indian lands?

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,634

UNITED STATES, EX REL. THE SHOSHONE INDIAN
TRIBE AND THE ARAPAHOE INDIAN TRIBE OF
THE WIND RIVER RESERVATION IN WYOMING,
ROBERT N. HARRIS, A MEMBER OF THE SHO-
SHONE TRIBE AND NELLIE F. SCOTT, A MEM-
BER OF THE ARAPAHOE TRIBE, FORT WASH-
AKIE, WYOMING,

Appellants,

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR,

Appellee

Appeal from an Order of the United States District Court
for the District of Columbia Dismissing the Complaint

BRIEF FOR THE APPELLANTS

Jurisdictional Statement

This is an appeal from an order of the United States District Court for the District of Columbia entered September 6, 1956, granting the defendant's motion to dismiss the complaint and dismissing the complaint. The appeal was filed November 1, 1956 (Jt. App. 19). The jurisdiction of the district court is founded on Title 11, Section 306, of the District of Columbia Code and upon the ground that

the matter in controversy arose under the laws of the United States. This Court has jurisdiction under 28 U.S.C. 1291.

Statement of the Case

This is an appeal from an order of the district court granting the defendant's motion to dismiss the complaint brought by two Indian tribes and their representatives to seek judicial review of the action of the Secretary of the Interior in disposing of their oil and gas deposits without competitive bid and at nominal public land rents.

In 1953 the United States bought and the Tribes were paid for the surface only of 161,520 acres of land forming a part of the Wind River Indian Reservation in Wyoming. The consideration for the sale was \$6.25 per acre for the surface only. Act of August 15, 1953, c. 509, 67 Stat. 592.¹ The subsurface was not appraised, bought or sold. It was not an element of the bargain. Section 1 of the 1953 Act used broad words of grant from the Tribes to the United States for both surface and subsurface, but this broad grant was limited by the phrase, "except as provided in section 5." Section 5 of the Act specified that, as to the subsurface, the Tribes were to be credited with 90% "of the gross receipts received of the United States, as they are received from time to time, from all leases, bonuses, royalties, or other proceeds derived under the mining and mineral-leasing laws of the United States" from any of the 161,520 acres.

It is the position of the Tribes that, so long as they retain the right to 90% of the proceeds from the mineral deposits, they remain the beneficial owners of the minerals, and that such mineral deposits, beneficially owned by the Tribes, may not be leased under the Mineral Leasing Act of 1920 (30 U.S.C. 181), which is limited to public lands

¹ For full text, see Appendix, *infra*, pp. 54-57.

"owned by the United States" but may be leased only by competitive bid in accordance with the special 1916 statute governing these particular lands or the general statutes governing Indian lands. Act of August 21, 1916, c. 363, 39 Stat. 519; Act of May 29, 1924, c. 210, 43 Stat. 244 (25 U.S.C. 398); and Act of May 11, 1938, c. 198, sec. 2, 52 Stat. 347 (25 U.S.C. 396b). See 25 CFR 192.4 and 187.7. The Secretary of the Interior, however, presuming to act under the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, as amended, has committed the entire 161,520 acres to oil and gas leases without competitive bids and for nominal rentals.

The Court is here called upon to examine a statute expressing a transaction between the sovereign and two of its tribal wards. In every such case the integrity and honor of the Government are in issue. Where the choice is open, that construction of the statute should be adopted which will secure to the Tribes, the *cestui que trust*, optimum rights in the property. Unless no other course is available, the United States should not be charged with the intent to deprive its tribal wards of substantial property rights without compensation. The critical statute cannot be construed in isolation but only against the entire history of relationship between the United States and the plaintiff Tribes.

The Shoshone Tribe was once the owner of a vast domain. In 1863 the United States recognized the boundaries and extent of its country as containing 44,672,000 acres in Wyoming, Colorado, Idaho and Utah (Treaty of July 2, 1863, 18 Stat. 685). Five years later, the Government induced the Shoshones to give up their country and take in exchange a relatively tiny reservation of 3,054,182 acres in Wyoming. The United States solemnly pledged that the small reservation was "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians

* * *'' (Treaty of July 3, 1868, 15 Stat. 673; *Shoshone Tribe v. United States*, 299 U.S. 476, 485-486 (1937)).

This was only a pen-and-ink pledge. In 1872 after persuading "the Indians that they did not need the land," the United States purchased 710,642 acres from the Indians for \$27,500—a sum since judicially declared to be a "shockingly low" and unconscionably small consideration. Brunot Agreement of September 18, 1872, 18 Stat. 291; *Shoshone Tribe of Indians of the Wind River Reservation, Wyoming v. United States*, 3 Ind. Cl. Comm. 313, 343, Fdg. 20, p. 332 (1954).²

Five years later, again in violation of its treaty pledge of "absolute and undisturbed use and occupation", the United States, without the consent of the Shoshones and over their protests, moved the Arapahoe Tribe under military escort onto the Shoshone Reservation. There was no judicial redress since by law the courts were then closed to the Shoshone Tribe. Act of March 3, 1863, c. 92, sec. 9, 12 Stat. 767. But sixty years later, when Congress granted the Tribe special permission to have this particular grievance heard, the Supreme Court held that the 1878 action of the United States constituted a taking under the Fifth Amendment of an undivided one-half of the Shoshone reservation for the benefit of the Arapahoe Tribe. *Shoshone Tribe v. United States*, 299 U.S. 476 (1937). Ever since 1878, the Shoshone Tribe and the Arapahoe Tribe have been owners in common of the reservation—now referred to as the Wind River Reservation.

Even with both Tribes on the land, the governmental policy of attrition by purchase continued. In 1896, without regard to the treaty promise, a ten-mile square was carved out of the reservation and taken from the Indians for a

² The full text of the finding and the pertinent excerpt from the opinion are set out in the Appendix, *infra*, p. 57.

nominal sum. Agreement of April 21, 1896, approved by the Act of June 7, 1897, c. 3, sec. 12, 30 Stat. 62, 93.

In 1904, at the instance and persuasion of the Government, the Indians did "cede, grant, and relinquish to the United States, all right, title, and interest which they may have" in 1,480,000 acres, representing about two-thirds of their already greatly diminished reservation. The oil and gas deposits in suit were part of this cession. The United States paid nothing for the conveyance but agreed to dispose of the "ceded"³ lands under the "homestead, town-site, coal and mineral land laws, or by sale for cash." Agreement of April 21, 1904, approved by the Act of March 3, 1905, c. 1452, Art. I, II, 33 Stat. 1016, 1019. Despite the all-inclusive language of the cession conveying both surface and subsurface ("cede, grant, and relinquish * * * all right, title, and interest"), the Indians remained the equitable owners and the United States a trustee. *United States v. Shoshone Tribe*, 304 U.S. 111, 114 (1938); *Florence E. Gallivan*, 60 I.D. 417, 418 (1950); see *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). Through the years, portions of the "ceded" land were sold and the proceeds credited to the Indians. Finally, in 1939, Congress directed that the ceded lands remaining undisposed of and "not within any reclamation project heretofore authorized" be restored to the Tribes. Act of July 27, 1939, c. 387, sec. 5, 53 Stat. 1128, 1129 (25 U.S.C. 575).

³ "Ceded" or "surplus" lands are words of art in Indian law. They mean lands where title has been surrendered by Indian tribes to the United States without compensation but where the Government has the duty of collecting the proceeds derived from the land for the benefit of the Indians. *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); *Morrison v. Work*, 266 U.S. 481 (1925); *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *United States v. Brindle*, 110 U.S. 688 (1884); *Hanson v. United States*, 153 F. 2d 162 (C.A. 10, 1946); *Confederated Bands of Ute Indians v. United States*, 100 C.Cl. 413 (1943); *Florence E. Gallivan*, 60 I.D. 417 (1950).

Well prior to 1916, portions of the "ceded" land (i.e., the 1,480,000 acres ceded under the 1905 Act) were known to be valuable for oil and gas. Some of those lands had been allotted to individual Indians and some patented as homesteads. Oil had been discovered. The Secretary had approved oil and gas leases on some of the allotted lands but he had no authority to issue leases to the "undisposed of" ceded lands as to which the Tribes were beneficial owners. To protect the Tribes' interest until legislation could be procured, the lands were withdrawn as a petroleum reserve by Presidential Order of August 2, 1912.⁴ In order that the Tribes might derive benefit from the oil and gas deposits, Congress empowered the Secretary of the Interior to lease the "ceded" land for oil and gas "under such terms and conditions as shall be by him prescribed" with the proceeds or royalties from the leases to be "applied to the use and benefit of said tribe * * *." Act of August 21, 1916, c.363, 39 Stat. 519.⁵ Pursuant to that Act, the Secretary promulgated regulations to govern oil and gas leasing on the "ceded" land (25 CFR Part 192). Those regulations require that the land be offered for lease by competitive sale to the "highest responsible bidder" (25 CFR 192.4). The lease royalty was fixed at 12-1/2% and the annual rental at \$1.25 per acre (25 CFR 192.17). The Tribes were entitled to use sufficient gas for schools or other buildings free of charge (25 CFR 192.18). For the 37 years prior to the Secretary's action in this case, oil and gas leasing on those lands were administered under the 1916 Act.

⁴ S. Rept. No. 712, 64th Cong., 1st sess. (1916); H. Rept. No. 975, 64th Cong., 1st sess. (1916); 53 Cong. Rec. 12159, 12256-8 (1916).

⁵ This was the forerunner of general legislation establishing the federal policy ever since in force, requiring that all Indian lands be leased for oil and gas at public auction to the highest responsible bidder. Act of May 29, 1924, c. 210, 43 Stat. 244, 25 U.S.C. 398; Act of May 11, 1938, c. 198, sec. 2, 52 Stat. 347, 25 U.S.C. 396(b). (See 25 CFR 187.7 requiring competitive bids.)

We explained above (*supra*, p. 5) that pursuant to the Act of July 27, 1939 (25 U.S.C. 575), undisposed of lands in the 1904 ceded area *not within a reclamation project* were restored to the Tribes. However, such a project, the Riverton Reclamation project, had been authorized by Congress in 1920. It embraced about 332,000 acres of the 1904 "ceded" lands. At the time it created the project, Congress recognized the beneficial ownership of the Tribes in the "ceded" lands when it provided that the proceeds from the sale of "ceded" land to reclamation entrymen be credited to the Tribes. Acts of June 5, 1920, c. 235, 41 Stat. 874, 915, and March 4, 1921, c. 161, 41 Stat. 1367, 1404.⁶ The project was constructed and through the years about 100,000 acres of the 332,000 acres of "ceded" land in the Riverton project were sold and the proceeds credited to the Tribes. An additional 70,500 acres not required for the project ultimately were restored to the Tribes under section 4 of the Act of August 15, 1953, c.509, 67 Stat. 592, 613. (Appendix, *infra*, p. 56) (S. Rept. No. 644, 83d Cong., 1st sess. (1953), pp. 8, 9). This left 161,520 acres—the land in suit—which never had been sold or restored to the Tribes and to which the Tribes held beneficial title (S. Rept. No. 644, *supra*, p. 9).

The 161,520 acres were not in a solid block but consisted of numerous small isolated tracts interspersed throughout the Riverton Reclamation project. Individual settlers in the project frequently desired to enlarge their holdings by purchasing isolated tracts of "public" land, but the "ceded" land did not fall into that category. S. Rept. No. 644, *supra*, p. 9. See footnote 6, below.

⁶ Under the law the Bureau of Reclamation had authority to sell surface rights only. Act of May 20, 1920, c. 192, 41 Stat. 605, 606 (43 U.S.C. 375); Act of May 16, 1930, c. 292, sec. 4, 46 Stat. 367 (43 U.S.C. 424(c)); and Act of March 31, 1950, c. 78, 64 Stat. 39 (43 U.S.C. 375d). See 43 CFR 402.10.

To cure this situation, the Bureau of Reclamation sometime in 1950 initiated steps to acquire the equitable title of the Tribes in the *surface* of the 161,520 acres. The prime purpose was to permit the Bureau more efficiently to administer the Riverton Reclamation project for the benefit of the project farmers. Incidental to this was the desire to settle tribal claims against the United States arising from the Government's unauthorized use of the "ceded" land for the establishment of right of ways for canals, ditches and transmission lines and for the removal of sand and gravel and other building materials without tribal consent. S. Rept. No. 644, *supra*, p. 9. Negotiations were continued into 1953. *Oil and gas leasing and mineral deposits were foreign to the discussions.* It was understood from the beginning and throughout the negotiations that the Tribes were selling and the United States was buying the *surface* only.

An appraisal of the surface was made and the average per-acre price of \$6.25 was agreed upon as "the value of the land for agricultural and grazing purpose" (H. Rept. No. 269, 83d Cong., 1st sess. (1953), p. 2). The appraisal report dated May 1, 1952, explicitly recited (p. 13): "*This appraisal applies only to surface rights.*"⁷ On this basis, the consideration of \$1,009,500 was reached (161,520 acres x \$6.25 = \$1,009,500). The matter was submitted to Congress since tribal property may not be alienated without the consent of Congress. Act of July 22, 1790, c.33, 1 Stat. 137. The Act of August 15, 1953, c.509, 67 Stat. 592, fol-

⁷ Emphasis is supplied throughout this brief unless otherwise indicated. The appraisal report is part of the administrative record and was filed with the Committees of Congress considering the matter. Hearings Senate Subcommittee on Indian Affairs, H.R. 4483, 83d Cong., 1st sess. (May 5, 1953), pp. 41, 94. But it is not before the Court since this case is here on appeal from a judgment sustaining appellee's motion to dismiss the complaint. But this fact is not denied.

lowed, appropriating the \$1,009,500 and confirming the transfer (see Appendix, *infra* pp. 54-57).

There is no question but that the ceded lands were known to be valuable for oil and gas. Prior to the 1953 Act, 36 leases had been issued by competitive bids pursuant to the special leasing statute governing these very lands. Act of August 21, 1916, c.363, 39 Stat. 519. At the time of the 1953 Act, 20 of those leases were *producing* oil and gas. Twelve of the leases were for oil and gas deposits underlying the 161,520 acres in suit. One of those 12 was a producing lease. Of course, the Tribes, the United States and the defendant were fully aware of this.

During the very period that negotiations were being conducted for the purchase of the *surface* of the 161,520 acres, oil and gas leases on small portions of the 161,520 acres were offered at public auction pursuant to the 1916 Act under the direction and supervision of the Secretary of the Interior. Substantial bonuses were bid for the right to lease. Offers were accepted, bonuses paid, and leases issued, all under the 1916 Act, as is disclosed by the following tabulation:⁸

Lease Number	Acres	Bonus	Bonus per acre	Lease Date
1. I-96-Ind-77-38	160	\$ 3,600	\$ 22.50	March 29, 1949
2. I-97-Ind-77-39	120	1,500	12.50	March 29, 1949
3. I-96-Ind-78-32	160	1,240	7.75	September 11, 1951
4. I-96-Ind-78-31	120	3,660	30.50	September 11, 1951
5. 14-20-258-42	980	160,004	163.27	December 31, 1952
6. 14-20-258-48	370	30,626	82.77	March 30, 1953
7. 14-20-258-49	1860	430,199	231.29	March 30, 1953
8. 14-20-258-50	40	3,066	76.65	March 30, 1953
9. 14-20-258-52	590	30,276	51.31	March 30, 1953
Total:	4400	\$664,171		
Average bonus \$150.95 per acre				

We see that in the single month of March 1953, when the

⁸ Jt. App. 9. The figures shown above have been verified by the lease records. They vary slightly from those recited in counsel's letter of March 23, 1955, to Secretary McKay. Of course, the full lease data are part of the administrative record not before the court on the motion to dismiss.

negotiations for the sale of the surface were in progress, the oil and gas rights in 2860 acres of the 161,520 acres were competitively leased and brought the Tribes \$494,167 in bonuses or an average of \$172.75 per acre (lease items 6 to 9, inclusive in the table, *supra*).

Prior to the Act of August 15, 1953, public land applications had been filed under the Mineral Leasing Act of 1920 to obtain oil and gas leases on these very lands without competitive bidding but they had been rejected since the Mineral Leasing Act controls only the oil and gas leasing of *public* "deposits of * * * oil, * * * or gas, * * * owned by the United States" (30 U.S.C. 181). *Florence E. Gallivan*, 60 I.D. 417, 419 (1950), discussed *infra*, at pp. 24-25. Under it, the first-qualified applicant who pays a filing fee of \$10 plus payment of the first year's rental of 50¢ an acre receives a five-year lease to deposits such as these in suit *without competitive bidding and payment of bonuses*. The second and third years' rent is free. The fourth and fifth years' rent is only 25¢ per acre and 50¢ per acre per year thereafter (30 U.S.C. 226). It would be a great wind-fall indeed to obtain leases on another's land under these minimal terms of the Mineral Leasing Act of 1920, as amended.

It is not surprising that promptly after the Act of August 15, 1953, became law, applicants swiftly filed on the entire 161,520 acres for oil and gas leases under the Mineral Leasing Act of 1920. Without notice and without consultation of any kind with the Tribes, the Secretary granted the oil and gas applications and issued some 96 leases covering the oil and gas deposits under practically every available acre of the 161,520 acres of "ceded" land. This meant that the land, only 2860 acres of which in March 1953 brought almost \$500,000 in bonuses under competitive leasing, was leased for nominal rentals and without bonuses. It meant

an annual rental averaging 20¢ per acre for the initial term of five years instead of \$1.25 per acre per year as required by the laws governing Indian lands. To anyone familiar with the oil and gas leasing business, this meant the bonuses would be paid to the initial lessee, not to the Tribes.

Although their property was at stake, the Tribes were never formally advised of the Department's action and were never given an opportunity to present their views before the Secretary acted on the Mineral Leasing Act applications and issued leases. Promptly after the Tribes heard of the situation, administrative proceedings were instituted protesting the action of the Department in leasing the "ceded" oil and gas deposits under the Mineral Leasing Act as if those deposits were public lands "owned by the United States."

The protest was denied. In his decision,⁹ the Secretary held that the "trusteeship of the United States with regard to these minerals, and the prior beneficial ownership of the Tribes, was effectively terminated" by the Act of 1953 (Appendix, *infra*, p. 62); that, by virtue of the provisions of section 2 of the 1953 Act under which "all unentered and vacant land [described in the Act] * * * are hereby restored to the public domain for administrative use, occupancy and disposal under the reclamation and public land laws of the United States: * * * ", the lands including the minerals "became public lands of the United States subject to administration under the public land laws" including the Mineral Leasing Act of 1920 (Appendix, *infra*, p. 66); and that section 5 providing for crediting the Tribes with 90% of the receipts as received "from all leases, bonuses, royalties, or other proceeds derived from

⁹ The full text of the Secretary's opinion is set out in the Appendix, *infra*, pp. 57-68.

the mining and mineral-leasing laws of the United States" confirmed "that the lands were to become subject to the general mining and leasing laws of the United States in the same manner as other public land * * * " (Appendix, *infra*, p. 66).

Plaintiffs having exhausted their administrative remedy brought this suit seeking judicial review.¹⁰ The Secretary chose not to answer the complaint and produce the full administrative record but moved to dismiss on the grounds that the complaint failed to state a cause of action and that the outstanding lessees are indispensable parties. The district court filed a memorandum opinion (Jt. App. 17) in which it took the position that the Act of 1953 placed the lands "within the public domain." At the same time the district court seemed to recognize that the 90% interest in the proceeds constituted a "beneficial interest outstanding in the Indians" (Jt. App. 17). The plaintiffs' motion for reconsideration was denied and the order of dismissal was entered September 6, 1956. This appeal followed. (Jt. App. 18-19.)

Statutes Involved

The full text of the Acts of August 21, 1916, c. 363, 39 Stat. 519, and August 15, 1953, c. 509, 67 Stat. 592 (except for the land description), are set out in the Appendix, *infra*, pp. 53-57.

Section 1 of the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, as amended by section 1 of the Act of August 8, 1946, sec. 1, c. 916, 60 Stat. 950, 957 (30 U.S.C. 181), provides:

¹⁰ An injunction *pendente lite* was also sought to enjoin the Secretary from authorizing drilling under the leases (30 CFR 221.58a) or to approve assignments (30 U.S.C. 187; 43 CFR 192.140). Although he had earlier refused to do so (Jt. App. 15), at this point, the Secretary agreed to issue the appropriate orders to his subordinates to preserve the *status quo* and this has been done.

"That deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, * * * shall be subject to disposition in the form and manner provided by this Act * * * ."

Statement of Points

The district court erred in:

1. In concluding that the appellants, the Shoshone Indian Tribe and the Arapahoe Indian Tribe of the Wind River Reservation in Wyoming, were divested of their beneficial interests in the oil and gas underlying the land in suit by the Act of August 15, 1953, c. 509, 67 Stat. 592;
2. In holding that those deposits of oil and gas were subject to disposal as public lands owned by the United States under the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended; and
3. In sustaining the decision of the Secretary of the Interior to the effect and dismissing the complaint.

Summary of Argument

It is conceded that oil and gas deposits beneficially owned by Indian tribes are not subject to leasing under the Mineral Leasing Act of 1920. That Act applies only to deposits "owned by the United States." It is further conceded that, prior to the Act of August 15, 1953, under consideration, the Tribes were the beneficial owners of the oil and gas deposits underlying the 161,520 acres in suit and that for 37 years those deposits were leased by competitive bidding at public sale under the Act of August 21, 1916, in accordance with the consistent policy of the United States to lease Indian oil and gas at public sale only (*infra*, pp. 16-17).

The Tribes sold and the United States bought and paid for the *surface* only of 161,520 acres. The oil and gas were

not bought or sold. The 1953 Act authorized and confirmed the transaction. The language of conveyance, termination and extinguishment contained in section 1 of the 1953 Act did not extinguish the beneficial ownership of the Tribes in the oil and gas. That language was qualified by the provisions of section 5 of the Act under which the Tribes own 90% of the proceeds from the disposal of the oil and gas and other minerals. The law is established that, no matter how broad the language of conveyance, the Tribes remain the beneficial owners so long as they own the proceeds. *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *United States v. Brindle*, 110 U.S. 688 (1884); *Hanson v. United States*, 153 F. 2d 162 (1946); *Confederated Bands of Ute Indians v. United States*, 100 C. Cls. 413 (1943). This was the consistent administrative viewpoint illustrated in some 33 instances prior to the Secretary's decision in this case. *Restoration to Tribal Ownership of Ceded Colorado Ute Indian Land*, 56 I.D. 330 (1938); *Florence E. Gallivan*, 60 I.D. 417 (1950). It follows that the oil and gas is beneficially owned by the Tribes and therefore continues subject to leasing under the 1916 Act calling for competitive bids on these lands (*infra*, pp. 17-31).

The Secretary's holding that the 1953 Act extinguished the beneficial title reflects the strictest possible construction of the literal meaning of the words of the 1953 Act. It fails to consider the public policy to lease Indian oil and gas by competitive bidding only or the decisions of the Supreme Court and the Department of the Interior establishing the doctrine that, regardless of language, beneficial title remains in the Indians so long as the proceeds belong to them (*infra*, pp. 31-36).

The Secretary's review of the 1953 Act and its legislative history is premised on the erroneous assumption that bene-

ficial title was extinguished. Neither the language of the act, nor its legislative history, supports the construction that Congress intended, in the case of this land and these Tribes and no other, to depart from the consistent and long-established policy of the United States to lease Indian oil and gas by competitive bidding only (*infra*, pp. 36-38).

Section 2 of the 1953 Act is limited to surface rights and provides no support for the Secretary's construction that beneficial title to the oil and gas was extinguished and made a part of the public domain (*infra*, pp. 37-39).

Section 5 of the Act refers to the payment of 90% of the proceeds from "bonuses." The Secretary's construction leaves this without meaning, since under the Mineral Leasing Act bonuses are possible only when the oil and gas is within the known geologic structure of a producing oil and gas field. The oil and gas deposits under consideration are not and never have been within the known geologic structure of a producing oil and gas field. Under the 1916 Act, however, bonuses are and have been paid even though the oil and gas is not within the known geologic structure of a producing oil and gas field. Section 5 also refers to "mining and mineral-leasing laws of the United States" and is not confined to *public* or *general* mining and mineral-leasing laws as the Secretary holds. The quoted phrase includes the Act of 1916 governing leasing of the oil and gas in suit. That Act is a mineral-leasing law of the United States and is here applicable (*infra*, pp. 39-44).

In deciding the question here, the Secretary failed to follow the law and policy concerning disputes between the United States and Indian tribes. He took a stiff approach to the end of sustaining the public land views as against the Indians' rights, without regard to the rules of construction governing Indian statutes or the policy of the United States to lease Indian oil and gas by competitive bidding only, or

his own obligation arising from his fiduciary relationship to the Tribes and his participation in the transaction as both buyer (representing the United States) and seller (representing the Tribes) (*infra*, pp. 44-51).

Argument

The oil and gas deposits underlying the land in suit are not subject to leasing under the Mineral Leasing Act of 1920.

The legal issue here can be sharpened by marking out certain uncontroverted propositions. First, it is undisputed that the Mineral Leasing Act of February 25, 1920, as amended, empowers the Secretary to issue oil and gas leases only to deposits "owned by the United States" (30 U.S.C. 181). *Justheim v. McKay*, 123 F. Supp. 560 (1954), affirmed 97 U.S. App. D.C. 146, 229 F. 2d 29 (1956). Second, it is undisputed that ceded Indian lands in which the tribe retains an equitable or beneficial interest are not subject to oil and gas leasing under the Mineral Leasing Act since they are not public property "owned by the United States." *Florence E. Gullivan*, 60 I. D. 417 (1950). Third, it is undisputed that, prior to the 1953 Act under consideration, the Tribes were the beneficial owners of the land in suit. This was the holding in the *Gullivan* decision in 1950 and the Secretary so conceded in the case at bar, stating that before the 1953 Act "the United States was in the position of a trustee of these lands and the minerals therein for the benefit of the tribes" (Appendix, *infra*, p. 61).

The precise question before the Court then is whether the Act of August 15, 1953, finally and completely ended the beneficial or equitable interest of the Tribes in the oil and gas conveyed in section 1 of the Act? If the Tribes remain the beneficial owners, the oil and gas deposits may not be leased under the Mineral Leasing Act covering deposits

owned by the United States, unless specifically so directed by the Act of August 15, 1953. The lands must be leased under the special authority of the 1916 Act or other statutes governing Indian oil and gas deposits.

A. *The 1953 Act did not extinguish the equitable or beneficial interest of the Tribes in the oil and gas deposits.* Section 1 of the 1953 Act specifies that the payment of \$1,009,500 "shall be deemed to constitute full, complete, and final compensation, *except as provided in section 5 of this Act*, for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes * * *." This outright conveyance is qualified by section 5 which provides that the Tribes be credited with "90 per centum of the gross receipts of the United States, as they are received from time to time, from all leases, bonuses, royalties, or other proceeds derived under the mining and mineral leasing laws of the United States * * *."

The 1953 Act is another in a long series of cessions extracted from Indian tribes by the United States. We look to the views taken by the courts and the Department of the Interior with respect to prior cessions containing all-inclusive language of conveyance that we may understand the reason the Tribes remain the beneficial owners of the mineral deposits despite the broad language of termination and extinguishment contained in section 1 of the 1953 Act.

The late Felix S. Cohen, "an acknowledged expert in Indian law" (*Squire v. Capoeman*, 351 U.S. 1, 8-9 (1956)), classified cessions by Indian tribes into two broad patterns—"cession and removal" and "relinquishment in trust" (Cohen, *Handbook of Federal Indian Law* (1945), p. 334). Most treaties, agreements and statutes, prior to the policy of allotting Indians in severalty adopted in the 1880's, fall into the "cession and removal" class. They provided for abso-

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lute and outright cessions or conveyances by Indian tribes in return for which the Indians received cash, annuities, or other lands. In those transactions, the tribes sold and the United States bought and paid for all tribal interests. Nothing was left in the tribes.¹¹ *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 I.D. 559, 559-560 (1934). So far as the surface of the lands is concerned, the 1953 Act falls into this class. The Tribes were paid \$1,009,500, the agreed value of the surface. They retained no interest in the surface.

Subsequent to 1880, the "relinquishment in trust" pattern developed. Tribal lands not needed for allotment were deemed "surplus" and were conveyed by Indian tribes to the Government. The United States itself did not buy or pay for the lands. Instead, the Government agreed to dispose of them and credit the Indians with the proceeds as, if and when the lands were sold. Such lands are commonly referred to as "ceded" or "surplus" (*supra*, p. 5 n. 3) and remained tribal property until disposed of as provided by law (*idem*, 54 I.D. 559, 560 (1934); Cohen, Felix S., *Handbook of Federal Indian Law* (1945), p. 334). This class embraces the subsurface of the lands described in the 1953 Act. The United States did not buy the minerals from the Shoshone and Arapahoe but agreed only to pay 90% of the proceeds received from time to time.¹²

¹¹ Examples of this type are legion. A representative number are cited in Cohen, *Handbook of Federal Indian Law* (1945), p. 294, fn. 64, and p. 334, fn. 520; see also, *Beaulieu v. Garfield*, 32 App. D.C. 398 (1909), holding that a treaty of cession with payment by the United States places the lands in the public domain.

¹² The 10% was to compensate the United States for administrative services (S. Rept. No. 644, 83d Cong., 1st sess. (1953), p. 9). It is an arbitrary figure which has nothing to do with the trust status of the land or with the value of the services rendered. It has its origin in the Department of the Interior's seeming fascination with the symbol "10%" as a neat proportion to deduct from the trust proceeds derived from Indian trust property as compensation for administrative services. This

There are numerous instances of these "relinquishment in trust" transactions. Thirty-three examples embraced in 25 separate statutes are listed in the opinion and order approved by the Secretary of the Interior in 1935, temporarily withdrawing such lands from disposal pending consideration of their permanent restoration to the tribes (*idem*, 54 I.D. 559, 561-562, 564).¹³ In each instance, the language of conveyance from the tribe to the United States was all inclusive, covering in terms every interest in the land; yet, in each instance, because the proceeds of the sale were to be credited to the Indians, the tribe retained an equitable or beneficial interest (see *infra*, pp. 26-28). The test of beneficial ownership was whether the tribe retained a right to the proceeds. If so, it continued to be the beneficial owner.

An extreme example of "relinquishment in trust," despite the broad language employed, is found in the Act of

is illustrated by the 10% deducted from all sales of timber from restricted Indian land, individual or tribal (25 CFR 61.25). The fact that 10% is charged in no sense alters the trust status of the land. This whole subject has been under investigation by Congress and the Department has come under severe criticism for the arbitrary 10% figure on which it makes a profit at the expense of the Indians for performing governmental services. H. Rept. No. 2960, 84th Cong., 2d sess. (1956), p. 17. See also 102 Cong. Rec. 4284, A5238 (1956). The latter is an instance where the disclosures of the investigation led the Bureau of Indian Affairs to reduce the charges to 7%. The Supreme Court's voluntary observations on a related point provide an interesting sidelight. *Squire v. Capoeman*, 351 U.S. 1, 4, n. 7.

¹³ This action was pursuant to section 3 of the Act of June 18, 1934, c. 576, 48 Stat. 984, authorizing the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened * * *", except as to "lands within any reclamation project." This authority embraced "relinquishment in trust" lands only, including undisposed of oil and gas deposits where the surface had been patented by the United States. *Davidson Hill and Kenneth M. Wilson*, A-25883, Solicitor's opinion of September 5, 1950, printed in Hoffman, *Oil and Gas Leasing on the Public Domain* (1951). Some land was restored to the appellant Tribes but the land in suit was not eligible for restoration since it was within a reclamation project.

June 15, 1880, c.223, 21 Stat. 199, one of the 33 cessions listed in the Secretary's order. Section 3 of that Act specified that "all lands not so allotted, the title to which is, by said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States released and conveyed to the United States, *shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of public lands*, at the same price and on the same terms as other lands of like character * * *." Despite this unmistakably clear and comprehensive language, the Solicitor of the Department of the Interior held that the Utes retained beneficial ownership. *Restoration to Tribal Ownership of Ceded Colorado Ute Indian Land*, 56 I.D. 330 (1938). The Solicitor stated (56 I.D. at pp. 337-338):

However, it is also my opinion that this declaration ["shall be held and deemed to be public lands"] did not make the 1880 cession different in legal effect from the Crow cession or other usual surplus land cessions where the Indians were to receive the proceeds of the sale. The significant legal effect of these cessions is that the United States becomes a trustee for the disposal of the land ceded. *Regardless of the particular language of the cession, the result is that the Indians retain an equitable interest in the land until they have received the consideration bargained for, and the United States becomes a "trustee in possession."*

The Solicitor was confirmed in his views by the Court of Claims in *Confederated Bands of Ute Indians v. United States*, 100 C.Cls. 413, 432 (1943). About two weeks after the Solicitor's opinion, the United States took this beneficial interest from the Utes and for this taking paid one of the largest judgments ever rendered—\$31,938,473.43. *Con-*

federated Bands of Ute Indians v. United States, 117 C.Cls. 433, 442 (1950); see also *ibid*, 120 C.Cls. 609, 610, Fdg. 1 (1951).

In his opinion, the Solicitor relied on the decisions in *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), and *Minnesota v. Hitchcock*, 185 U.S. 373 (1902) (56 I.D. at pp. 332, 335, 337, 338). In the *Ash Sheep Co.* case, the Supreme Court construed the Crow cession contained in the Act of April 27, 1904, c. 1624, 33 Stat. 352, and held that the Indians were entitled to any benefits from the use of the land prior to sale. There, the United States sought to enjoin the Ash Sheep Company from grazing sheep on the ceded lands (the language of conveyance was "cede, grant, and relinquish to the United States all right, title, and interest", with the proceeds from sale under the land laws to the benefit of the Indians). The sheep company contended that the effect of the conveyance was "to vest the complete and perfect title in the Government" and make the public land open to free grazing (252 U.S. at p. 164).

The Supreme Court rejected this argument. It did not confine itself to the language of conveyance but looked to the prime purpose of the agreement which was to secure to the Indians the fullest possible value for their lands and to make use of the proceeds for the tribe's benefit. The Court concluded (252 U.S. at p. 166):

Taking all of the provisions of the agreement together, we cannot doubt that while the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, *nevertheless, until sales should be made, any benefits which might be derived from the use of the lands would belong to the beneficiaries, and not to the trustee, and that they did*

not become "public lands" in the sense of being subject to sale or other disposition, under the General Land Laws.

In *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), the statute directed that the proceeds from the sale of the ceded land be credited to the Minnesota Chippewas. Act of January 14, 1889, c.24, sec. 1, 25 Stat. 642. It provided "for the complete cession and relinquishment in writing of all their title and interest" and specified that "acceptance and approval of such cession and relinquishment * * * shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided."

The State of Minnesota claimed all sections 16 and 36 in the ceded area under a prior grant from the United States of all "school sections" on the public land within that state. Despite the sweeping language of the cession ("shall operate as a complete extinguishment of the Indian title"), the Supreme Court denied Minnesota's claim. It said (185 U.S. at pp. 394-395):

* * * The cession was not to the United States absolutely, but in trust. * * * The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds * * * to the credit of the Indians * * *.

In other words, whether the Indians are beneficial owners does not depend on the language. It is the obligation to dispose of the lands and credit the tribes with the proceeds which controls.

Minnesota v. Hitchcock was followed and applied in *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913), which upheld the right of the Chippewa Indians to recover against the United States for damages caused by selling Chippewa lands under the public land

laws rather than according to the method prescribed by the agreement with the Indians.

Earlier, the Supreme Court had characterized the arrangement with the Minnesota Chippewas, under the 1889 Act as follows (*Morrison v. Work*, 266 U.S. 481, 483 (1925)):

* * * The United States has exercised and is now exercising, in respect to the property dealt with in said act and agreement, the powers of a guardian for these Indians, and of a trustee in possession.

United States v. Brindle, 110 U.S. 688, 693 (1884), is another example illustrating that the language of conveyance does not alter the tribe's equitable interest created by the Government's obligation to pay the proceeds from the sale or lease. In that case, the words of conveyance from the Delaware and other Indian tribes were "cede, relinquish, and quit-claim * * * all their right, title, and interest" (Treaty of May 6, 1854, Art. 1, 10 Stat. 1048). The sales specifically were to be "governed in all respects * * * by the laws of the United States respecting the sales of the public lands" (Article 2). Brindle was a federal land receiver. He sued for commissions not only on the sales of public lands but also on the sales of the Indian ceded lands. The law provided for a maximum of \$2500 in commissions on the sale of public lands. Brindle claimed the ceded lands were not public lands and therefore the \$2500 maximum did not apply. The Supreme Court agreed with Brindle, holding (110 U.S. at p. 693):

These Indian trust lands were never public lands of the United States and were never subject to sale at the Lecompton [public] land-office. The cessions to the United States were in trust, to survey, manage and sell the lands and pay the net proceeds to or invest them for the Indians. There was never a time that

the United States occupied any other position under the cessions than that of trustees, with power to sell for the benefit of the Indians. In equity, under the operation of the Treaties, *the Indians continued, until sales were made, the beneficial owners of all their country ceded in trust.* Of this we have no doubt. * * *

Hanson v. United States, 153 F. 2d 162 (C.A. 10, 1946), presented a situation similar to that in the *Ash Sheep Co.* case, *supra*, pp. 21-22, except that no agreement existed between the Indians and the United States. The statute simply directed, as did so many others, that the Indians' lands should be restored to the public domain, offered for sale, and the proceeds of the sale applied to reimbursing the United States for moneys advanced, with the balance to be used for the benefit of the Indians (153 F. 2d at p. 162). The Court held Hanson liable under a statute providing penalties for running stock on "land belonging to any Indian or Indian Tribe, without the consent of such Tribe." The Court stated (p. 163):

* * * We think it clear that, while the legal title passed to the United States and the lands were subject to entry and sale, the beneficial title remained in the Indians and the United States held the lands as trustee for the Indians. We see no distinction between the instant case and *Ash Sheep Company v. United States*, 252 U. S. 159, 40 S. Ct. 241, 64 L. Ed. 507. The only difference is that in that case the trust relationship was created by an agreement amended and ratified by an Act of Congress. Here, it was created by Act of Congress.

Prior to the 1953 Act, the Department held the Tribes were the beneficial owners of the very oil and gas deposits in suit. *Florence E. Gallivan*, 60 I. D. 417, 419 (1950).

Gallivan applied under the Mineral Leasing Act of 1920 for an oil and gas lease covering a portion of the "ceded" land. The Secretary rejected the application on three independent grounds (60 I. D. at p. 419):

First:

* * * [that] the ceded but undisposed-of lands of the Shoshone or Wind River Indian Reservation do not come within the category of "lands * * * owned by the United States," because the beneficial interest in these lands is vested in the Indians of the Shoshone or Wind River Indian Reservation and they are entitled to any proceeds that may be derived from the use of these lands, including including their development for oil and gas.

* * * * *

Second:

* * * The subject of the issuance of oil and gas leases on lands within the ceded portion of the Shoshone or Wind River Indian Reservation is specifically covered by another statute, namely, the act of August 21, 1916 (39 Stat. 519).

* * * * *

Third:

* * * The Mineral Leasing Act of 1920 has never, during the 30-year period that has elapsed since its enactment, been utilized by the Department for that purpose. * * *

In the case at bar, the Secretary disposed of the *Gallivan* case as if it turned solely on the 1916 Act. The Secretary stated (Appendix, *infra*, p. 61):

* * * In view of this specific legislation, [the 1916 Act] the Department held in the *Gallivan* case referred to by the protestant that the 1916 Act provided the exclusive authority for the issuance of oil and gas leases on these ceded lands and that the Mineral Leasing Act of 1920, *supra*, was not applicable thereto.

But, a reading of the *Gallivan* opinion makes plain that the basic reason for the holding was the first one—that the Indians were the beneficial owners. The other two were confirmatory.

The 1953 Act did not remove the oil and gas deposits from the "relinquishment in trust" class. True, the language of grant in section 1 of the 1953 Act is all-inclusive. But, no matter what words were used in section 1 of the 1953 Act, no greater interest could be conveyed than that transferred by the language in the Ute cession (100 C. Cls. 413), or the Crow Tribe cession (252 U. S. 159), or the Minnesota Chippewa cession (185 U.S. 373; 266 U.S. 481; 229 U.S. 498), or the Delaware cession (110 U. S. 688), or the Wind River cession of 1905 (60 I. D. 417), or any of the other cessions in the "relinquishment in trust" class. "Regardless of the particular language of the cession, the result is that the Indians retain an equitable interest in the land until they have received the consideration bargained for, and the United States becomes a 'trustee in possession'" (56 I. D. at p. 338). The case at bar is not distinguishable.

Cessions have been made in trust notwithstanding that the Indians:

"cede to the United States all the territory of the present Ute Reservation * * * " "title to which is * * * released and conveyed to the United States" (Utes, Act of June 15, 1880, c. 223, secs. 1, 3, 21 Stat. 199; *Confederated Bands of Ute Indians v. United*

States, 100 C. Cls. 413 (1943); *Restoration to Ownership of Ceded Colorado Ute Indian Land*, 56 I.D. 330 (1938)); or

agree to a "complete cession and relinquishment in writing of all their title and interest" (*Minnesota Chippewas*, Act of January 14, 1889, c. 24, sec. 1, 25 Stat. 642; *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *Morrison v. Work*, 266 U.S. 481 (1925); *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913)); or

"cede, convey, transfer, relinquish, forever and absolutely, without any reservation whatever, all their claim, title and interest of every kind and character in and to the lands * * *" (*Wichita*, Act of March 2, 1895, c. 188, Art. I, 28 Stat. 876, 895; 54 I.D. 559); or

"cede, grant, and relinquish to the United States all right, title, and claim * * *" (*San Carlos*, Agreement of February 25, 1896, ratified by Act of June 10, 1896, c. 398, sec. 10, 29 Stat. 321, 358; 54 I.D. 559) (*Delaware*, Treaty of May 6, 1854, Art. 1, 10 Stat. 1048; *United States v. Brindle*, 110 U.S. 688 (1884)); or

were subject to a statute under which "all the unallotted lands within said reservation shall be restored to the public domain" (*Uintah and Ouray*, Act of May 27, 1902, c. 888, 32 Stat. 263; 54 I.D. 559); or

"cede, surrender, grant, and convey to the United States all their claim, right, title, and interest * * *" (*Rosebud Sioux*, Agreement of September 14, 1901, ratified by Act of April 23, 1904, c. 1484, Art. I, 33 Stat. 254; 54 I.D. 559); or

"cede, grant, and relinquish to the United States all right, title, and interest * * *" (*Crow*, Agreement of August 14, 1899, ratified by Act of April 27, 1904, c. 1624, Art. I, 33 Stat. 352; *Ash Sheep Co. v. United*

States, 252 U.S. 159 (1920)) (Shoshone and Arapahoe, Agreement of April 21, 1904, ratified by Act of March 3, 1905, c. 1452, 33 Stat. 1016; 54 I.D. 559; *Florence E. Gullivan*, 60 I.D. 417 (1950)).

The use of words of conveyance in section 1 of the 1953 Act, no matter how broad, does nothing to negative the equitable interest established in section 5 of the 1953 Act. This is particularly true since section 1 explicitly recites the qualifying phrase that the compensation is payment in full "except as provided in section 5 of this Act." The inescapable point is that the United States did not buy the mineral deposits and the Tribes were not paid for the minerals. It follows, to borrow language from *Minnesota v. Hitchcock*, 185 U.S. 373, 394 (1902), that, as to the subsurface, the 1953 cession "was not to the United States absolutely, but in trust." The trust was that the oil and gas was to be leased and 90% of the proceeds credited to the Tribes.

The Secretary had nothing to say about the line of cases and administrative decisions establishing the doctrine that, regardless of language, beneficial title is in the Indians so long as the proceeds from the sale belong to them. He was silent with respect to the 33 instances where he regarded the Indians as holding the equitable title to land, based on the doctrine of the Supreme Court cases he failed to mention in his opinion. The Secretary's real trouble was that he read literal words without regard to public policy or factual background to mean that the historical trust relationship between the Tribes and the United States had been destroyed as to oil and gas.

The Secretary readily conceded that, prior to the 1953 Act, the Tribes were the beneficial owners and the United States a trustee of the lands (Appendix, *infra*, p. 61). But at the same time, he asserted in effect that the trust rela-

tionship had been created by the use of the word "trustee" in the 1905 cession. The Secretary stated (Appendix, *infra*, p. 61):

* * * This prior trusteeship is readily apparent from the language of the act of March 3, 1905 * * * [which provides] "that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds from the sale thereof as received" * * *.

The Secretary's statement is erroneous if it means that, but for the "trustee" language in the 1905 Act, the Tribes would have been the beneficial owners and there would have been no trust relationship. The idea that beneficial title depends on the presence of words of "trust" was invented for this case. It formed no part of the basis for the determination of beneficial ownership in the 25 statutes covered in 54 I.D. 559 (1938), although at least 13 of those statutes contained no words of trust (see *infra*, pp. 29-30). The use of the word "trustee" in the 1905 cession from appellant Tribes was not even mentioned in the *Gallivan* case (60 I.D. 417) and formed no part of the basis for the conclusion that the Tribes were the beneficial owners of the oil and gas.

The point is that the presence or absence of trustee language in the cession is immaterial. Indian tribes hold beneficial title, and the cession is in trust notwithstanding the word "trust" is nowhere used. For example, none of the following cessions contained words of "trust", yet the Indians were held to be beneficial owners and the United States trustee. Delaware, Treaty of May 6, 1854, Art. I, 10 Stat. 1048, *United States v. Brindle*, 110 U.S. 688, 693 (1884); Utes, Act of June 15, 1880, c. 223, 21 Stat. 199, *Confederated Bands of Ute Indians v. United States*, 100

C. Cls. 413 (1943), *Restoration to Tribal Ownership of Ceded Colorado Ute Indian Land*, 56 I.D. 330 (1938); Minnesota Chippewas, Act of January 14, 1889, c. 24, 25 Stat. 642, *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), *Morrison v. Work*, 266 U.S. 481 (1925), *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); Umatilla, Act of March 3, 1885, c. 319, 23 Stat. 340; Round Valley, Act of October 1, 1890, c. 1271, 26 Stat. 658; Klamath River, Act of June 17, 1892, c. 120, 27 Stat. 52; Wichita, Act of March 2, 1895, c. 188, 28 Stat. 876, 895; San Carlos, Agreement of February 25, 1896, ratified by Act of June 10, 1896, c. 398, 29 Stat. 321, 358; Uintah & Ouray, Act of May 27, 1902, c. 888, 32 Stat. 263, as amended; Flathead, Act of April 23, 1904, c. 1495, 33 Stat. 302; Rosebud, Agreement of September 14, 1901, ratified by Act of April 23, 1904, c. 1484, 33 Stat. 254; Kiowa, Comanche and Apache, Act of June 5, 1906, c. 2580, 34 Stat. 213; Cheyenne and Arapahoe, Act of June 17, 1910, c. 299, 36 Stat. 533; *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 I.D. 559 (1938).

Since the Tribes remain the equitable owners of the oil and gas deposits, those deposits are not "owned by the United States." Therefore, they were no more subject to leasing under the Mineral Leasing Act after than they were before the 1953 Act. *Florence E. Gallivan*, 60 I.D. 417 (1950). The court below thought the beneficial interest in the mineral deposits was extinguished and "the only beneficial interest outstanding in the Indians, if indeed it can be called such," was in 90% of the proceeds (Memorandum Op. Jt. App. 17). The memorandum opinion does not mention the controlling decisions or give any clue to the basis for this view. If the court below is right, there was a taking under the Fifth Amendment of the beneficial interest in the subsurface, rather than a relinquishment in trust.

If the district court was right, then the Supreme Court was wrong in *Morrison v. Work*, 266 U.S. 481 (1925); *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); and *United States v. Brindle*, 110 U.S. 688 (1884). And the whole course of administrative policy and practice with respect to millions of acres of ceded trust lands has been erroneous (see 54 I.D. 559).

B. *The 1953 Act does not authorize or require the leasing of the oil and gas deposits under the Mineral Leasing Act.* Basic to the Secretary's entire opinion is the premise that the 1953 Act extinguished the beneficial ownership of the Tribes in the oil and gas and terminated the trusteeship of the United States. Otherwise, even the Secretary would agree that, after the 1953 Act, the oil and gas continued subject to the leasing authority of the 1916 Act, just as it did before. We have shown that the Secretary's basic premise is erroneous—that under the settled law the beneficial ownership of the Tribes in the oil and gas continues so long as they have the right to 90% of the proceeds (*supra*, pp. 17-31). It follows that the oil and gas is not "owned by the United States" and therefore the leases issued under the Mineral Leasing Act of 1920 are void. Certainly, if the Tribes are the beneficial owners of the oil and gas, the Act of 1953 provides no authority to bypass the 1916 Act and issue public land leases to Indian-owned oil and gas deposits under the Mineral Leasing Act.

For 37 years prior to the 1953 Act, the oil and gas deposits in suit were administered under the Act of August 21, 1916, c. 363, 39 Stat. 519, and its implementing regulations (25 CFR Part 192). That Act empowered the Secretary to lease for oil and gas "lands within the ceded portion" of the Shoshone and Arapahoe reservation. It has

never been repealed and continues in force. Nothing in the 1953 Act changed the status of the mineral deposits. They continued to be within the ceded portion of the reservation and the Tribes continued to be the beneficial owners. The Secretary was obligated to continue leasing under the 1916 Act unless compelled by an unequivocal and affirmative mandate from Congress to transfer the leasing to the Mineral Leasing Act. The 1953 Act contains no such mandate. In fact, it contains no language calling for abandonment of the 1916 Act and substitution of the Mineral Leasing Act.

Nowhere in the 1953 Act is either the special 1916 Act or the Mineral Leasing Act of 1920 mentioned. There was no occasion for such mention. They formed no part of the consideration either between the Tribes and the United States or before Congress. Nothing about either act is found in the debates (99 Cong. Rec. 3399-3407, 9892, 10503). No mention of them was made in the report of the House Committee or by the Secretary in his communications with the congressional committees although he had administered the oil and gas under the 1916 Act for 37 years (H. Rept. No. 269, 83d Cong., 1st sess. (1953)). The Senate Committee report, however, sets out the full text of the special 1916 Act with the following preface (S. Rept. No. 644, 83d Cong., 1st sess. (1953), p. 6) :

The act of August 21, 1916, authorizes the Secretary of the Interior to lease for production of oil and gas from lands within the ceded portion of the Wind River Reservation and the proceeds or royalties arising from any such leases [shall] be applied to the use and benefit of said Indians.

If it were intended to repeal the 1916 Act by implication and again by implication substitute the Mineral Leasing

Act, some mention of such extraordinary departure from the established national policy of selling Indian oil and gas leases at public sale would have been expressed at the point where the 1916 Act was set out *in toto* and discussed.

The complete absence of express provisions dealing with oil and gas leasing is enough to preclude the unprecedented decision of the Secretary. But, beyond this, the legislative history affirmatively shows that the primary purpose of the 1953 Act was to consummate the sale of the *surface* only for the agreed price of \$6.25 per acre. This was spelled out in the report of the House Committee, explaining that: "The purpose of this bill is to compensate * * * for approximately 161,500 acres of land which the Indians relinquished to the Federal Government *for reclamation purposes*" (H. Rept. No. 269, 83d Cong., 1st sess. (1953), p. 1). "For reclamation purposes" could not include minerals (see p. 7 *supra*). That the surface only was involved is established by the House Committee's reference to the appraisal report "based upon the value of the land for agricultural and grazing purposes * * *" (*idem*, p. 2). In his letters to the Committees, the Assistant Secretary of the Interior also used the quoted language in explaining the coverage of the appraisal report (H. Rept. No. 269, *supra*, p. 3; S. Rept. No. 644, *supra*, p. 9).

The members of the House understood the purpose of the bill to be routine confirmation of an agreed sale of the surface only. On the floor of the House, the manager of the bill explained (99 Cong. Rec. 3400 (1953)):

This bill is *merely* an authorization to pay the Indians the amount of money that was agreed upon after a survey and appraisalment was had. This is a clean bill, incorporating all of the recommendations of the Department of the Interior, all their objections, and all their requests for amendments.

In the Senate it was made equally clear that surface only was involved. Thus, there was concern expressed as to whether veterans could pay \$6.25 per acre for the land and doubt was expressed as to whether it was worth \$6.25 per acre. That doubt of course was predicated on surface, not mineral value (99 Cong. Rec. 9892 (1953)). A clear definition of what the \$1,009,500 consideration represented is found in Senator Barrett's (Wyo.) explanation to the Senate (99 Cong. Rec. 10503 (1953)):

In addition to the purchase of lands which were priced from \$6 to \$10 an acre, the tribes are also to be compensated for gravel which was taken from canals built on their lands, for telephone lines erected on their lands, and for other uses of the lands over that period.

There is nothing here about oil and gas, let alone the abandonment of competitive leasing at public sale or the diminishment of rents or surrender of lease bonuses. The only alteration in the *status quo* was to pay the United States 10% out of the proceeds from the minerals for its management services. There was no occasion to diminish the potential proceeds by wiping out oil and gas bonuses. There was no reason for making this land and these Tribes the sole exception to the law and policy calling for competitive leasing of Indian oil and gas deposits.

The legislative history leaves no room for the view that the Indians were parting with their beneficial interest in the oil and gas, nor does it permit a statute compensating for the agreed value of the surface only to be seized upon as a device for converting Indian oil and gas deposits into public property.¹⁴

¹⁴ See the article in the *Washington Post and Times Herald* of January 9, 1956, by Warren Unna, entitled "The Giveaway Charges—Selling of Indians' Wealth by Government is Alleged." Under the subheading "Interior 'Interpreted' ", the action of the Department with respect to oil

Construction of an act of Congress does not call for abandonment of common-sense considerations. We must keep in mind that, when the 1953 Act was enacted, Congress was aware of the special 1916 Act which had been in successful operation for 37 years. It knew that the policy of the United States, as expressed in the statutes governing Indian lands, was to offer oil and gas leases at public auction only. Acts of May 29, 1924, c. 210, 43 Stat. 244, 25 U.S.C. 398; May 11, 1938, c. 198, 52 Stat. 347, 25 U.S.C. 396(b). See 25 CFR 187.7, requiring competitive bids. It was aware that, for the benefit of the Tribes, the Treasury was receiving substantial royalties from producing wells on the ceded lands and was receiving large bonuses (almost \$500,000 in March 1953, preceding passage of the 1953 Act) from the competitive sale of oil and gas leases and that those bonuses would be lost if the Mineral Leasing Act controlled.

The Secretary suggests no reason why the Indians, acting under his control and with his advice, in a situation where he stood as a fiduciary, and yet undertook to represent both buyer and seller, should have surrendered their right to bonuses and higher rents as a free donation to public land lease applicants. And the court below is silent on the point. No reason is offered for charging Congress with the intent to depart in the instance of these two Tribes and no others, and on this particular Indian land and no other, from the sedulous and long-established public policy of offering *all* Indian oil and gas for lease to the high bidder. Exclusion of these Indians from the beneficial policy governing all other Tribes would be without precedent in the annals of the Department of the Interior's steward-

and gas leasing on the 161, 520 acres in suit is discussed (reprinted in 102 Cong. Rec., 3336 (1956)). And see the answer made on behalf of Secretary McKay by Senator Goldwater (102 Cong. Rec., 3098 (1956)). The answer is wholly silent on the point that this was Indian land and underscores the arbitrary injustice of the Secretary's action.

ship over Indian affairs. It makes the Tribes the sole exception to what heretofore has been considered to be the law and policy of the United States. Congress did not open the way for the Secretary thus to enlarge the benefits available to oil and gas lease applicants at the expense of the *cestui que trust*.

1. *The Secretary's construction of the 1953 Act is wholly untenable.* Once he adopted the erroneous premise that the Tribes' beneficial title was extinguished, the Secretary simply took the position that the oil and gas deposits were public property of the United States subject to noncompetitive leases unless the 1953 Act contained explicit words to the contrary. This view was forecast by the Assistant Secretary's letter of April 22, 1956, issued five months before the opinion (Jt. App. 14).

Thus, on the premise that all beneficial title was extinguished, the opinion recites that the Secretary examined the legislative history but " * * * fail[ed] to find any statement or reference which would indicate that only the surface rights to the lands were to be extinguished * * *", and the beneficial rights to the minerals retained (Appendix, *infra*, p. 65). This pretense of objective innocence is most frustrating. The Secretary knew the facts; he knew that the consideration of \$1,009,500 divided by \$6.25 represented the acreage purchased because he made the deal—he represented both buyer (Bureau of Reclamation) and sellers (the Tribes); he knew that \$6.25 per acre represented the value of the surface only, as appraised by the expert employed by the Tribes but selected for them by the Secretary's agent; he knew that a copy of the appraisal of the surface was filed with him and with the committees of Congress; he knew that the committee reports made plain that the appraisal was "based upon the value of the land for agricultural and grazing purposes * * * " because he so advised the commit-

tee himself (*supra*, p. 33); he knew that the Indians were not paid for the minerals; and he knew the responsibility to account for the proceeds from the mineral continued.

On the assumption that beneficial title was extinguished, the Secretary examined the 1953 Act for express words making the 1916 Act applicable but could not find them. But, since the Tribes are the beneficial owners, he should have looked for express words repealing the 1916 Act; otherwise, it continues in force. Repeals by implication are not favored. *Federal Trade Com. v. A. P. W. Paper Co.*, 328 U.S. 193, 202 (1946); *United States v. Borden Co.*, 308 U.S. 188, 198-9 (1939); *West v. Work*, 56 App. D.C. 191, F. 2d 828, 831 (1926).

So we see, it was on a false premise and the alleged absence of language that the Secretary reached the unwarranted conclusion that the beneficial ownership was extinguished and therefore the 1916 Act was repealed by implication and supplanted by implication by the Mineral Leasing Act. To bolster this dual implication, the Secretary points to sections 2 and 5 of the Act. Neither supports him.

a. *Section 2 of the 1953 Act does not support the Secretary.* Section 2 provides:

Subject only to the existing rights and interests which are not extinguished and terminated by this Act, all unentered and vacant lands within the area described in section 1 hereof, are hereby restored to the public domain for administration, use, occupancy, and disposal under the reclamation and public land laws of the United States: *Provided*, That the sale or other disposition of such lands shall be at rates and upon terms and conditions approved by the Secretary of the Interior: *Provided further*, That the average price of all such lands disposed of by sale shall be not less than \$6.25 per acre.

This section deals with the surface rights. It makes no mention of minerals and minerals are not within its context. It is confined to the lands "for which compensation to the Indian Tribes is made in section 1." H. Rept. No. 269, *supra*, p. 4; S. Rept. No. 644, *supra*, p. 10. That compensation, \$1,009,500, was for the surface only. The Secretary himself had emphasized this in his own letters to the committees, where he explained that the appraisal was "based upon the value of the land for agricultural and grazing purposes" (H. Rept. No. 269, *supra*, p. 3; S. Rept. No. 644, *supra*, p. 9).

Section 2 talks about the restoration of "*unentered and vacant lands*" to the public domain, not mineral deposits. It was designed to deal with the surface of the lands under the administration of the Bureau of Reclamation. This is confirmed by the legislative history. As originally drafted, section 2 provided "for administration, use, occupancy, and disposal under the 'homestead and reclamation laws.'" In order to facilitate administration by the Bureau of Reclamation, which has nothing to do with minerals, the Secretary wrote to the committees, stating (H. Rept. No. 269, *supra*, p. 4; S. Rept. No. 644, *supra*, p. 10):

Section 2 of the bill deals with the disposition of the lands for which compensation to the Indian tribes is made in section 1. It speaks * * * of disposal under the "homestead and reclamation laws" and provides * * * that sales to entrymen for farm units shall be at the rate of \$1.50 per acre. Administration of this section would be greatly facilitated if the words "reclamation and public land laws" were substituted for "homestead and reclamation laws * * *."

The Secretary's suggestion was incorporated into the bill as enacted.

This explanation dissolves the thin fabric by which the Secretary has undertaken to impair the rights of the Indian wards and diminish their income. Section 2 does not provide the clear language required to remove the leasing of Indian oil and gas from the protection of special Indian statutes to the general law embodied in the Mineral Leasing Act of 1920. Nothing short of explicit verbiage may be taken to wipe out competitive public sales with attendant high bonus payments for the Tribes' oil and gas (see *supra*, p. 9, showing bonus income of \$494,167 in March 1953 from only 2860 acres of the 161,520 acres in suit). A transfer of the leasing from Indian to public land category in derogation of the Tribes' rights may not be implied from general language designed for the surface only.

b. *Section 5 of the 1953 Act does not support the Secretary.* Section 5 deals with the minerals and compensation for those minerals. It provides that: "Notwithstanding any other provision of law",¹⁵ the per-capita funds of the Tribes

¹⁵ The Secretary asserted that the quoted phrase "necessarily precludes disposition of the funds under the act of August 21, 1916, *supra* [extinguishment of debts, etc.], section 35 of the Mineral Leasing Act of 1920, as amended (30 U.S.C., sec. 191 [37½% to the state, 52½% to the reclamation fund]), the Reclamation Laws, or any other law." We are not sure that we understand what the Secretary had in mind. But we are sure that the phrase was inserted to make certain that the Indians' 90% of the proceeds was to be available for distribution per capita pursuant to the Act of May 19, 1947, and the amendatory acts of 1951, 1953 and 1956 (25 U. S. C. 612, 613), cited both in section 1 and section 5 of the 1953 Act. Eighty-five per cent of all the earnings and income from all sources, including oil and gas, "derived from the Wind River Reservation under any law" (25 U.S.C. 612, 613) is distributed per capita each quarter to the members of the Tribes. The purpose of the "notwithstanding" clause was to insure that the 90% of the proceeds would be subject to the laws calling for the 85% per capita. Whether the land is leased under the 1916 Act or the Mineral Leasing Act, the same 85% per-capita distribution is made. The Secretary apparently was not aware that, well before the 1953 Act, the provisions of the 1916 Act for disbursement of the proceeds were superseded so that all income derived under the 1916 Act and all other sources was disbursed per capita pursuant to the Act of 1947. Act of August 30, 1951, c. 367, 65 Stat. 208 (25 U.S.C. 612). See S. Rept. No. 541, 82d Cong., 1st sess. (1951), p. 1.

were to be credited with 90% of the proceeds "as they are received from time to time, from all leases, bonuses, royalties, or other proceeds derived under the mining and mineral-leasing laws of the United States * * *."

The reference to "bonuses" in section 5 emphasizes that the Mineral Leasing Act of 1920 is inapplicable. Leases sold at public auction under the laws governing leasing of Indian oil and gas deposits bring bonuses. But, under the Mineral Leasing Act, *noncompetitive* leases are issued to the first-qualified applicant without public sale and without calling for bonuses, so long as the oil and gas deposits are not within a known geologic structure of a producing oil and gas field (30 U.S.C. 226). The oil and gas deposits in suit are not now, and never have been, within any known geologic structure of a producing oil or gas field. Proof is that the entire 161,520 acres are now covered with leases and applications without competitive bids. If the Secretary's decision stands, all right to bonuses is forever gone. It follows that the word "bonuses" in section 5 has no meaning unless that section contemplated leasing under the 1916 Act or other Indian leasing statutes where "bonuses" were called for and paid, even though the lands were not in the known geologic structure of a producing oil or gas field.

The Secretary did not discuss the presence of the word "bonuses" in section 5. He simply asserted that the terms "mining and mineral-leasing laws of the United States" used in section 5 "obviously have reference to the general public land and mineral law" and do not include the special 1916 Act (Appendix, *infra*, p. 53). This is the advocate's language, not the fiduciary's. Characterizing language as "obvious" does not make it so. Section 5 does not refer to *general* or *public* mining and mineral-leasing laws of the United States. Those words "general" or "public" can-

not be read into the law. Certainly, the Act of 1916 enacted for the precise purpose of regulating oil and gas leasing on ceded Indian land is a "mineral-leasing law of the United States." The Secretary's position, to the contrary, is without precedent and without support.¹⁶ The Secretary may not legislate new language into section 5 to amend the clause "mining and mineral laws of the United States" so as to make it read "general public land and mineral laws of the United States", particularly, when the result would defeat the interest of the tribal wards, the *cestui que trust*, and constitute a departure from the established public policy of the United States.

The Secretary reasoned that, if the Indians retained beneficial ownership of the minerals, "they would not be subject to location, entry, and patent under the mining laws, and no effect could be given to that portion of the Act. (43 U.S.C., sec. 22)." (Appendix, *infra*, p. 66.) We do not follow the Secretary's reasoning any more than we perceive relevancy in the code citation he gives "(43 U.S.C., sec. 22)." If beneficial ownership continues in the Indians,

¹⁶ The Secretary's opinion quotes excerpts from unprinted testimony, given before the Senate Subcommittee on Indian Affairs by an employee of the Department of the Interior (Appendix, *infra*, pp. 64-65). We understand that part of the hearings were in executive session and part were not. We cannot determine from which part the excerpts used by the Secretary came and whether they may be properly considered at all. In any event, there is nothing in the quoted excerpts which precludes leasing under the laws governing Indian lands. Apart from this, the law is established that the statements of a witness before a committee of Congress are without weight for the purpose of construing the statute. This Court has held that: "Individual opinion of witnesses at a hearing [before a committee of Congress] is of doubtful value in the interpretation of an act." *Railroad Retirement Board v. Duquesne Warehouse Co.*, 80 U.S. App. D.C. 119, 149 F. 2d 507, 510 (1945), affirmed 326 U. S. 446, citing *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-494 (1931), where the Supreme Court, in even stronger language, said that " * * * statements inconsistent with the conclusion which we reach were made to committees of Congress * * * such individual expressions are without weight in the interpretation of a statute."

then the minerals may be disposed of under the applicable "mining and mineral leasing laws of the United States" as provided in section 5 of the 1953 Act. This would include, in particular, the Act of 1916 as to oil and gas.

A parallel situation existed before the 1953 Act. The Shoshone-Arapahoe cession of 1905 (33 Stat. 1016) subjected all minerals in the ceded lands to disposal under the public land laws ("provisions of the homestead, town-site, coal and mineral land laws"). In 1916, Congress separated the oil and gas and put them under the special leasing authority of the Act of August 21, 1916. From 1916 up to the Secretary's action here, the 1916 Act and the 1905 Act operated in harmony. Minerals other than oil and gas were subject to disposal under the public land laws. After the 1916 Act oil and gas went by competitive bid only. The 1953 Act and the 1916 Act can operate together just as the 1916 and 1905 Acts operated together for 37 years.

The Secretary cited *Oklahoma v. Texas*, 258 U.S. 574 (1922), in his opinion (Appendix, *infra*, pp. 66-67), to support the idea that, as used in section 5 of the 1953 Act, the term "mining and mineral-leasing laws of the United States" has no reference to the 1916 Act. However, *Oklahoma v. Texas* supports the opposite view, namely, that the 1953 Act does not apply to minerals whose disposal is covered by a special statute.

In that case, claim was made for a mineral location under a statute which specified that: "All valuable mineral deposits in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase * * *" (p. 559). The federal policy was that the mining laws of the United States did not apply to lands in Oklahoma (p. 601). The Court held that, read in context with the federal policy, the quoted language did not apply to *all* lands owned by the United States but only "where the United States has indicated that the lands are held for dis-

posals under the land laws does this section apply; *and it never applies where the United States directs that the disposal be only under other laws*" (p. 600).

The underscored language was quoted with approval by this Court in *West v. Work*, 56 App. D.C. 191, 11 F. 2d 828, 831 (1926). That was an action to compel the Secretary of the Interior to issue an oil and gas lease under the Mineral Leasing Act of 1920. Referring to the critical phraseology in both the statute construed in *Oklahoma v. Texas* and in section 1 of the Mineral Leasing Act, this Court stated (p. 831):

* * * The language in both is "lands belonging to the United States," and as to which the Supreme Court said: "It never applies where the United States directs that the disposal be under other laws." As we have seen, Congress expressly provided that lands in the state of Oklahoma should be disposed of under the homestead and townsite laws, and should be considered as agricultural lands [under Acts of 1890 and 1891]. The Act of February 25, 1920, does not expressly repeal the provisions of said acts. Repeals by implication are not favored. *The construction which more comports with reason is that the Act of February 25, 1920, was not intended to and did not repeal the specific provisions of law regulating the disposal of lands within the state of Oklahoma, including the lands in question, or more specific provisions of laws as to particular parts of the public domains.* * * *

The Secretary followed *Oklahoma v. Texas* and *West v. Work* in holding that marginal sea lands were not "owned by the United States" within the meaning of section 1 of the Mineral Leasing Act and, therefore, were not subject to noncompetitive leasing. The Secretary explained that "the Mineral Leasing Act, like other general public-land

laws, applies to any particular category of lands only if Congress has indicated that such lands are held for disposal under it." *Mineral Leasing Act*, 60 I.D. 26, 27 (1947). At the Secretary's instance, this same view was adopted in *Justheim v. McKay*, 123 F. Supp. 560 (Dist. Col. 1954), affirmed 97 U.S. App. D.C. 146, 229 F. 2d 29 (1956). By the same token, the 1953 Act does not make the Mineral Leasing Act applicable to the oil and gas deposits here covered by the special leasing Act of 1916.

2. *The Secretary has failed to follow the law and policy concerning disputes between the United States and Indian tribes.* This is not an ordinary suit for judicial review of administrative action. Here, the Secretary sits in a dual capacity. He represents the United States in its role as guardian of its dependent Indian wards and as trustee of their property. He also represents the United States as its manager in the disposition and leasing of public oil and gas. Different policies control the two functions and the Secretary has different obligations under each.

As to public lands owned by the United States, which are subject to disposal, the obligation of the Secretary is to carry out the congressional policy with an even hand. *McKay v. Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F. 2d 35 (1955). Public land and minerals may be given away (e.g., homesteads, uranium) or leased for nominal rentals (oil and gas) in fulfillment of a public policy of development of national resources. In such instances, the applicant seeking public property for no payment or a nominal one must unequivocally bring himself within the public land law to enjoy its benefits. In case of dispute, the Secretary is bound by the controlling rules of statutory construction that all doubts be resolved in favor of the government. *Sioux City & St. Paul R. Co. v. United States*, 159 U.S. 349, 360 (1895); *United States v. Oregon & California R. Co.*, 164 U.S. 526, 539 (1896).

But a different set of rules binds the Secretary in disputes between the United States and Indian tribes. In such cases, the Secretary is not dealing with public property—he is dealing with trust property. He is not dealing with applicants for the liberal benefits of the public land laws—he is dealing with Indian wards to whom the United States owes a special obligation. By law, the Tribes are prohibited from selling to anyone but the United States (Act of July 22, 1790, c. 33, 1 Stat. 137) and, by law, the United States has the obligation to administer the property of its wards for their advantage.

The principles governing disputes between the United States and its tribal wards are well summarized in *Choctaw Nation v. United States*, 119 U. S. 1, 28 (1886), where the Court stated:

The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. *The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right*, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws.

In varying form, this same view has been expressed in numerous decisions of the Supreme Court. Speaking of the

Shoshone Tribe, an appellant here, the Supreme Court made the judicial pronouncement that it is "the settled policy of the United States fairly to deal with Indian tribes." *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938). More specifically, the Court directed that in dealings between the United States and its wards concerning property all doubts are resolved in favor of the Indians. The Court stated (304 U.S. at p. 117):

* * * As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals or timber would be resolved in favor of the tribe.

In language peculiarly applicable here, this was reiterated in *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339, 354 (1941), where the Court declared:

* * * But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675, the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

In *Minnesota v. Hitchcock*, 185 U. S. 373, 402 (1902), the Court made it "a *duty* to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress." In the *Hitchcock* case (discussed supra, p. 22), a conflict in federal policy between the high duty to foster public schools

and the obligations to Indian tribes was resolved in favor of the latter.

And long ago, Mr. Chief Justice Marshall laid down the controlling precept in *Worcester v. Georgia*, 6 Pet. 515, 582 (1832), that:

The language used in treaties with the Indians should *never* be construed to their prejudice * * *. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

This doctrine has been consistently followed, and was applied for the benefit of appellant Shoshone Tribe in *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938), where the Court explained:

* * * In treaties made with them [Indian tribe] the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. *They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.* * * *

Most recently, Chief Justice Marshall's words in *Worcester v. Georgia* were reaffirmed by the Supreme Court in *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956). The question there was whether the proceeds from the sale of timber were subject to the federal capital gains tax. There was no exemption in the tax law and the Court agreed "that to be valid, exemptions to tax laws should be clearly expressed" (351 U.S. at p. 6). Nevertheless, applying Chief Justice Marshall's teaching, the Court read tax exemption into the statutory promise to deliver a fee patent to the Indian allotment "free of all charge or incumbrance whatsoever."

This case underscores the judicial approach to a transaction controlled by the United States and made on behalf of the ward. *A fortiori*, there is no room for the harsh attitude of the Secretary in a transaction, such as the one at bar, where the guardian itself buys from the ward and then endeavors to take advantage of the language of the conveyance.

The Indians here had no reason to suspect that their cooperation on the sale of the surface would mean a hundred fold loss in bonuses on oil and gas. For 37 years their oil and gas had been leased by competitive bid and had brought substantial bonuses. They had never known any other method of leasing. Competitive bids are called for on all their oil and gas lands, not just those in suit. Nothing on the face of the 1953 Act suggests that this was to be changed. In fact, the mention of the word "bonuses" in section 5 naturally would be understood by the Indians in all the circumstances to mean continuance of competitive bidding. Nothing is said in the 1953 Act about the Mineral Leasing Act or the 1916 Act. There was no occasion for the Indians to expect or comprehend a change.

Surely, had the Indians understood that a change was intended such as the Secretary claims, they would have refused the whole deal. No sense in giving up \$10 or \$12 million in potential bonuses to sell the surface for \$1 million. They knew of this potential value, since only a few months earlier they had received almost \$500,000 in bonuses for only 2,860 acres (see table, *supra*, at p. 9). And the speed with which hungry leaseholders gobbled up the deposits under the Mineral Leasing Act confirms this. On the other hand, if trick language was employed by the draftsmen of the Department of the Interior¹⁷ to make the bill read

¹⁷ If the administrative record were before the Court, it would show that the bill was drafted by persons in the Department.

satisfactorily to the Indians, but to leave room for the legal twist given the statute by Secretary McKay in this case, then we say this Court will not stamp it approved. The rules of statutory construction where Indians are concerned, taken together with the policy of the United States to lease Indian oil and gas lands by competitive bid only, allow ample room to carry out the intent of the parties and to do justice. Compare, *Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902), and *Squire v. Capoeman*, 351 U.S. 1 (1956).

At no time, either before or since the 1953 Act, has the Secretary advanced any explicable reason why the United States should seek to deprive these Indians of their bonuses. Why should these lands be excepted from the policy of competitive bids governing all other Indian lands including lands of the appellant Tribes immediately adjacent to the lands in controversy? If reason did exist, the Secretary should know it; after all, he handled the deal, including the drafting of the legislation. But he offered no reason because there is no valid reason that he can set down in writing. To borrow the phrase of Mr. Justice Cardozo: "Spoliation is not management." *Shoshone Tribe v. United States*, 299 U.S. 476, 498 (1937).

The Secretary's action in this case cannot be reconciled with the high standards of justice, morality and fair play which bind him. There is no room here for his stiff approach to the 1953 Act. One fact is salient—the Indians did not sell and the United States did not buy the oil and gas deposits. Beneficial title to the minerals never left the Tribes. In such circumstances, the Secretary had no choice but to read the statute so as to confer the greatest possible benefit on the Tribes, not on anonymous public-land lease applicants. Here, this means construing the 1953 Act to permit the leases to be sold at public auction in accordance with the policy of the United States for all Indian oil and

gas lands as expressed in the special Act of 1916 and the other laws of the United States governing leasing of Indian oil and gas.

The Court of Claims dealt with a similar problem in *Menominee Tribe of Indians v. United States*, 101 C.Cls. 10 (1944). There, the question presented was whether it was lawful for the Secretary of the Interior to apply one act of Congress where another would have resulted in substantially increased income to the Menominees. The Secretary argued that the statute compelled his action. The Court answered (101 C. Cls. at p. 21):

* * * The various acts of Congress authorizing expenditures from funds of the tribe did not repudiate the trust obligation. Under those acts the Secretary of the Interior had the power to comply with the trust obligation, i. e., to spend the non-interest-bearing funds first, to whatever extent they were available and sufficient. It would be fair to suppose that Congress expected him to do that, and thus fulfill the Government's duty as a quasi trustee. But whether Congress expects that, or was not conscious of the problem, the *Secretary, acting for the Government, was under a duty to act in harmony with the Government's position as a fiduciary*, and he was not prevented from doing so by the statutes under which he acted.

We say that the Secretary has reached into the wrong chest for his tools of statutory construction. Far from resolving all doubts, if any exist, in favor of the Indians, the Secretary took the extreme opposite tack. Consideration of the factors controlling on the Secretary are completely absent from his opinion. His opinion pretends that the rules governing the construction of Indian statutes were never written. He makes no effort to reconcile his action with the obligation to deal fairly with Indian wards whose

property he controls—to obtain optimum results for the *cestui que trust*. He makes no mention of his duties and obligations as guardian and trustee, or about the principles binding on him in carrying out those duties and obligations, or about the principles governing the decision of disputes between the United States and its wards. He is silent with respect to the law controlling the doctrine of beneficial ownership. He suggests no reason why the Indians should surrender their rights to bonuses and higher rents as a free donation to public land lease applicants. He applies only negative rules as if he were dealing at arms' length with a public land applicant seeking public benefits.

Of course, the Secretary may not deal so cavalierly with the property of the wards of the United States. Congress has created the trustee relationship by treaty and statute. In the absence of specific congressional direction, the obligation of the guardian to the ward may not be conveniently shed for the purpose of disposing of Indian property as if it were public land owned by the United States—all to the detriment of the Indian tribes.

The Shoshone and Arapahoe Indian Tribes prefer to have the benefit of the bonuses and higher rentals, just as do all other Indian tribes and other private owners of minerals, and just as the United States does on continental shelf lands. To the Tribes, income from their lands is bread-and-butter money. They depend on it for their day-to-day living. The Secretary has deflected from his legal obligation. The 3,400 members of the Tribes should not be charged with the serious loss resulting from his action.

Conclusion

The Secretary was confronted with the 1953 Act. He was under legal obligation to take the course which would resolve all doubts in favor of the dependent wards of the United States and in execution of his fiduciary duties. He

did not follow that course. Instead, he adopted rigid standards requiring him to read new language into the 1953 Act, repeal the 1916 Act by implication, diminish the potential income of the Tribes, and depart from the established policy of the United States to lease all Indian oil and gas at public auction. The result he reached was "clearly and indubitably erroneous." *McKay v. Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F. 2d 35, 46 (1955).

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Act of August 21, 1916, 39 Stat. 519

CHAP. 363.—An Act To authorize the Secretary of the Interior to lease, for production of oil and gas, ceded lands of the Shoshone or Wind River Indian Reservation in the State of Wyoming.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and empowered to lease, for the production of oil and gas therefrom, lands within the ceded portion of the Shoshone or Wind River Indian Reservation in the State of Wyoming, under such terms and conditions as shall be by him prescribed; and the proceeds or royalties arising from any such leases shall be first applied to the extinguishment of any indebtedness of the Shoshone Indian Tribe to the United States and thereafter shall be applied to the use and benefit of said tribe in the same manner as though secured from the sale of said lands as provided by the Act of Congress approved March third, nineteen hundred and five, entitled "An Act to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming, and to make appropriations for carrying the same into effect": *Provided, however,* That nothing contained in this Act shall be construed to abridge or enlarge any asserted or initiated rights or claims under any law of the United States.

SEC. 2. That the leases granted under this Act shall be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease, which shall not be less than one-tenth in amount or value of the production and the payment in advance of a rental of not less than \$1 per acre per annum during the continuance of the lease. The rental paid for any one year to be credited against the royalties as they accrue for that year. Leases shall be for a period of twenty years with the preferential right in the lessee to renew the same for successive periods of ten years each upon such reasonable terms and conditions as may be pre-

scribed by the Secretary of the Interior, unless otherwise provided by law at the time of expiration of any such period; said leases shall be irrevocable except for the breach of the terms and conditions of the same and may be forfeited and canceled by an appropriate proceeding in the United States District Court for the District of Wyoming whenever the lessee fails to comply with their terms and conditions.

Act of August 15, 1953, c. 509, 67 Stat. 592

CHAP 509. To provide compensation to the Shoshone and Arapahoe Tribes of Indians for certain lands of the River-ton reclamation project within the ceded portion of the Wind River Indian Reservation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby authorized to be transferred in the Treasury of the United States from funds now or hereafter made available for carrying on the functions of the Bureau of Reclamation and to be placed to the credit of the Shoshone and Arapahoe Tribes of Indians of the Wind River Indian Reservation in Wyoming, the sum of \$1,009,500, said sum shall be credited to and expended for the benefit of said tribes and their members as provided by the Act of May 19, 1947 (61 Stat. 102), as amended by the Act of August 30, 1951 (65 Stat. 208), and by the Act of July 17, 1953 (Public Law 132, Eighty-third Congress), and as may be hereinafter amended, and shall be deemed to constitute full, complete, and final compensation, except as provided in section 5 of this Act, for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to the lands, interests in lands, and any and all past and future damages arising out of the cession to the United States, pursuant to the Act of March 3, 1905 (33 Stat. 1016) of that part of the former Wind River Indian Reservation lying within the following described boundaries: [description appearing in statute here omitted].

Provided, That any member, or the heirs or assignees of

*(ie, which was ratified by
(govt brief, 21)*

any member, of either of said tribes, who on the 24th day of July 1952, had an existing and valid assignment on any part of the above-described land, shall have the right, at his or her option, within one year after the date of enactment of this Act, to enter into a contract with the United States, by and through the Bureau of Reclamation, for the purchase, at a price and on terms satisfactory to the Secretary of the Interior of all or any contiguous part of such assignment, and upon final payment of the purchase price therefor, a fee patent accordingly shall be issued to such assignee, subject to reservations of all oil, gas and minerals to the United States, and subject to section 5 of this Act, and if any part of the land so selected shall contain land irrigable under the Riverton reclamation project, then said patented land shall be subject to all irrigation charges, taxes, and liens imposed by Federal or State law, to the same extent and in like manner as other lands of the Riverton reclamation project: *Provided further*, That all existing contracts relating to irrigation charges, with respect to such irrigable land, shall remain in full force and effect: *And provided further*, That nothing in this Act shall be construed to affect the rights and interests in and to any land embraced within the tract described herein that has been allotted to an individual member of either of the said tribes which, on the date of enactment of this Act, is held by the United States in trust for such member or his or her heirs.

SEC. 2. Subject only to the existing rights and interests which are not extinguished and terminated by this Act, all unentered and vacant lands within the area described in section 1 hereof, are hereby restored to the public domain for administration, use, occupancy, and disposal under the reclamation and public land laws of the United States: *Provided*, That the sale or other disposition of such lands shall be at rates and upon terms and conditions approved by the Secretary of the Interior: *Provided further*, That the average price of all such lands disposed of by sale shall be not less than \$6.25 per acre.

SEC. 3. The sum transferred to the credit of the Shoshone and Arapahoe Tribes of Indians as aforesaid and the expenses of carrying out the provisions of this Act shall be nonreimbursable and nonreturnable under the reclama-

tion laws of the United States. The net proceeds derived from the disposal of said lands shall be covered into the general fund of the Treasury or into the reclamation fund as the Secretary of the Interior shall find appropriate in the light of the source from which the funds transferred or expended in carrying out this Act are derived.

SEC. 4. Subject to any outstanding rights and interests, all of the ceded lands of the Wind River Reservation withdrawn pursuant to the Act of June 17, 1902, for the development of the Riverton reclamation project, Wyoming, not included within the boundaries of the tract described in section 1 of this Act, are hereby restored to the ownership of said tribes to the same extent as the ownership provided by the Act of July 27, 1939 (53 Stat. 1128), with respect to vacant lands ceded to the United States under the provisions of the Act of March 3, 1905 (33 Stat. 1016), but not subsequently withdrawn for reclamation purposes: *Provided*, That the compensation authorized in section 1 hereof shall also be deemed to release the United States from any and all claims for damages whatsoever arising out of withdrawal of lands herein restored to tribal ownership.

SEC. 5. Notwithstanding any other provision of law, the United States shall deposit in the Treasury of the United States to the credit of said tribes, to be available for expenditure for the benefit of said tribes and their members, as provided by the Act of May 19, 1947 (61 Stat. 102), as amended by the Act of August 30, 1951 (65 Stat. 208), and by the Act of July 17, 1953 (Public Law 132, Eighty-third Congress), and as may be hereinafter amended, 90 per centum of the gross receipts of the United States, as they are received from time to time, from all leases, bonuses, royalties, or other proceeds derived under the mining and mineral-leasing laws of the United States from any and all lands in which all rights and interests of the tribes are terminated and extinguished by the terms and conditions of section 1 of this Act and which are embraced within the boundaries of the tract described in said section 1. Notwithstanding any other provision of law the remaining 10 per centum of such gross receipts shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts.

SEC. 6. Should this Act become law subsequent to June 30, 1954, there is hereby reserved to the Shoshone and Arapahoe Tribes the privilege of rejecting, within one hundred and twenty days after the date of the Act, the terms and conditions of its sections 1, 4, and 5. If those terms and conditions are rejected, no part of the Act shall become effective.

SEC. 7. The Secretary of the Interior is authorized to perform any and all acts to carry out the provisions and purposes of this Act.

Finding No. 20 and excerpt from the opinion of the Indian Claims Commission in The Shoshone Tribe of Indians of the Wind River Reservation, Wyoming v. United States, Docket No. 63, decided August 20, 1954, reported in 3 Ind. Cls. Comm. 313

Finding of Fact No. 20 (p. 332):

We further find that the consideration of \$27,500 paid by defendant to the petitioner for the Brunot lands worth \$560,513.60 constituted an unconscionable consideration under the provisions of the Indian Claims Commission Act.

Excerpt from the opinion (343):

Unconscionable Consideration.

Our finding (No. 20) to the effect that the purchase price of \$27,500 for land of the value of \$560,513.60 on September 26, 1872, was unconscionable under the provisions of the Indian Claims Commission Act requires no extended discussion. A purchase price of less than four cents per acre for lands worth twenty times that amount was shockingly low and plainly constituted an unconscionable consideration.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

September 22, 1955

THE SHOSHONE TRIBE OF INDIANS and the ARAPAHOE TRIBE OF
INDIANS OF THE WIND RIVER RESERVATION, Wyoming, ROBERT N. HARRIS, a member of the Shoshone Tribe and NELLIE SCOTT, a member of the Arapahoe Tribe, PROTESTANTS

v.

JULIAN H. ZIMMERMAN, *et al.*

Wyoming 024038, *et al.*

Request for assumption of jurisdiction by the Secretary.
Protest against issuance of oil and gas leases dismissed.

Jurisdiction Assumed by the Secretary

Protest Dismissed

On May 5, 1955, counsel for the above Indian Tribes filed a protest with the Director, Bureau of Land Management, against action theretofore taken in the Bureau in issuing certain oil and gas leases under the provisions of the Mineral Leasing Act of February 25, 1920, (41 Stat. 437, as amended; 30 U. S. C., secs. 181, *et seq.*) for certain lands within that portion of the Wind River Indian Reservation, Tremont County, Wyoming, described in section 1 of the act of August 15, 1953 (67 Stat. 592; Public Law 284, 83rd Cong., 1st Sess.). Copies of the protest were served on the 48 lessees named in the protest and their answers thereto have been made a part of the record.

On June 9, 1955, counsel for the tribes filed a request that the Secretary of the Interior assume immediate jurisdiction over the protest on the grounds that only legal questions are involved which would require the ultimate decision of the Secretary. All lessees were notified of this request on June 17 and were allowed 15 days in which to file

objections. No such objections have been received. The request is hereby granted for the reason that the protest involves certain fiscal and other rights of the Indian Tribes under the act of August 15, 1953, *supra*, and particularly in view of this Department's special duty in matters involving the welfare of those tribes. That the Secretary has authority to assume jurisdiction over any matter pending in the Department at any stage of the proceedings has been long established. *George C. Vournas*, 56 I.D. 390; *The Texas Company, et ano.*, A-27021 (August 10, 1954).

It is the position of the protestants that the lands described in section 1 of the 1953 act should have been leased by the Department under the provisions of the act of August 21, 1916, 39 Stat. 519, rather than under the general leasing laws, and for this reason the protested leases are void and should be canceled as having been issued contrary to law. The protestants request that the following action be taken:

(a) That all leases covering lands within the 161,500-acre area described in Public Law 284, which were issued under the provisions of the Mineral Leasing Act of 1920 be canceled;

(b) That all pending applications for lands within the area described, which seek leases under the 1920 act, be rejected;

(c) That all lands within the area described in Public Law 284 be administered in accordance with the act of 1916 and the regulations under that act. (25 CFR, Part 192).

As grounds for their protest, the protestants have made general reference to the Treaty of July 3, 1868, 15 Stat. 673; the agreement of April 21, 1904, ratified March 3, 1905, 33 Stat. 1016; the special leasing act of August 21, 1916, *supra*, and the decision of the Department in *Florence E. Gullivan, et al.*, 60 I.D. 417 (1950). Protestants also contend that under the provisions of Public Law 284, approved August 15, 1953, 67 Stat. 592, the tribes retained beneficial ownership of the minerals in the lands described in the act, and that the 1916 leasing act is therefore the exclusive authority for the leasing of those mineral interests.

Section 1 of Public Law 284 directs that certain funds be credited to the Shoshone and Arapahoe Tribes, and that such funds "shall be deemed to constitute full, complete, and final compensation, except as provided in section 5 of this Act, *for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to the lands, interests in lands, and any and all past and future damages arising out of the cession to the United States, pursuant to the act of March 3, 1905 (33 Stat. 1016) of that part of the former Wind River Reservation lying within the following described boundaries: * * **". (Emphasis supplied). The lands affected by the act are then described by metes and bounds.

Section 2 of Public Law 284 provides as follows:

"Sec. 2. Subject only to the existing rights and interests which are not extinguished or terminated by this Act, all unentered and vacant lands within the area described in section 1 hereof, are hereby restored to the public domain for administration, use, occupancy, and disposal under the reclamation *and public land laws of the United States: * * **". (Emphasis supplied).

Reference is also made to section 5 of the act providing that:

"Sec. 5. Notwithstanding any other provision of law, the United States shall deposit in the Treasury of the United States to the credit of said tribes, * * * 90 per centum of the gross receipts of the United States, as they are received from time to time, from all leases, bonuses, royalties, or other proceeds *derived under the mining and mineral-leasing laws of the United States from any and all lands in which all rights and interests of the tribes are terminated and extinguished by the terms and conditions of section 1 of this Act and which are embraced within the boundaries of the tract described in said section 1. * * **". (Emphasis supplied).

The principal question for our consideration raised by the protest is whether the tribes retained beneficial owner-

ship of the minerals in question such as would require that they be leased exclusively under the provisions of the special leasing act of August 21, 1916, *supra*. It is the position of the protestants that a trusteeship by the United States on behalf of the tribes existed prior to the passage of Public Law 284; that enactment of that legislation did not alter that relationship, and that the tribes have continued to be the beneficial owners of the minerals in question.

Protestants' references to the various treaties, acts and the decision of the Department in the *Gallivan* case, go only to establish a fact which has not been denied, i.e., that prior to the enactment of Public Law 284, the United States was in the position of a trustee of these lands and the minerals therein for the benefit of the tribes. This prior trusteeship is readily apparent from the language of the act of March 3, 1905 (33 Stat. 1016) by which Congress ratified an agreement which ceded the Wind River Reservation lands to the United States. In the 1905 Act Congress amended Article IX of the agreement of April 21, 1904, to expressly provide that it was the understanding of the parties "that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds from the sale thereof as received, as herein provided." (33 Stat. 1016, 1021).

With the act of August 16, 1916, *supra*, the Congress provided special leasing authority for the issuance of oil and gas leases on lands within the ceded portion of the Wind River Reservation. Under the provisions of that legislation, the trusteeship of the United States was amended with regard to the leasing of these lands and the disposition of the proceeds therefrom. Therefore, in its administration of the 1916 Act, the Government was merely continuing its trusteeship of the Wind River lands. In view of this specific legislation, the Department held in the *Gallivan* case referred to by the protestant that the 1916 Act provided the exclusive authority for the issuance of oil and gas leases on these ceded lands and that the Mineral Leasing Act of 1920, *supra*, was not applicable thereto.

We turn then to Public Law 284 for a determination of the question of whether under its provisions this original

trusteeship of the United States was to be continued. After a careful examination of this legislation we are of the opinion that the trusteeship of the United States with regard to these minerals, and the prior beneficial ownership of the tribes, was effectively terminated thereby. It is our further opinion that the provisions of Public Law 284 clearly and expressly justify the following conclusions:

(1) That section 1 thereof constitutes a full relinquishment and termination of all right, title, estate and interest in the lands described therein, including the surface and mineral rights;

(2) That by section 2 thereof, all the lands were restored to the public domain for disposal under the reclamation and public land laws, the latter including the general mining and mineral leasing laws of the United States, as fully confirmed, if that were needed, by the language in section 5 providing for disposition of the proceeds of such disposals;

(3) That if, under the Act, the United States is trustee for the Indians in any respect, it is only as a depository of the funds received under section 5 of the act, and that such trusteeship extends only to those *funds* rather than to the lands or minerals themselves; and, further, that the phrase "notwithstanding any other provisions of law" at the beginning of said section 5 necessarily precludes disposition of the funds under the act of August 21, 1916, *supra*, section 35 of the Mineral Leasing Act of 1920, as amended (30 U.S.C., sec. 191), the Reclamation Laws, or any other law.

The above conclusions are supported by the generally accepted rule of statutory construction that "when [legislative] language is clear and unambiguous it must be held to mean what it plainly expresses". *Sutherland Statutory Construction*, sec. 4702. There is nothing in the termination and extinguishment provisions of section 1 of the Act which could be said to be ambiguous. On the contrary, those provisions of that section must be said to express clearly that which Congress intended to do i.e., to terminate and extinguish all the right, title, and interest which the tribes

theretofore had in the lands and minerals described therein.

While we are of the opinion that the clear and unambiguous language of Public Law 284 precludes the use of extraneous sources, including the Congressional reports, for interpretation purposes (*Caminetti v. United States*, 242 U.S. 470, 490), even if the legislative history of the Act were resorted to, these conclusions would find full support. In this regard it is noted that the reports of this Department on the legislation at page 3 of House Committee Report No. 269 (83rd Cong., 1st Sess.) and at page 9 of Senate Committee Report No. 644 (83rd Cong., 1st Sess.), include the following statement:

“It is our understanding that the bill is to extinguish the Tribes’ interests in and to all the undisposed of, ceded lands within the boundaries of the Riverton Project, *including the minerals and oil and gas*, but that *in lieu thereof* the Tribes shall receive 90 per centum of the royalties, bonuses, or rentals received by the United States for such minerals or oil and gas”. (Emphasis supplied).

It seems apparent from this portion of these reports that it was the position of this Department, adopted by the Committees of both the House and Senate, that the entire interests of the tribes in these minerals would be extinguished by the legislation subject only to the payment of the receipts therefrom as directed by the Congress.

In these reports to the Committees it was also recommended by the Department that section 5 of the original bills be amended to include the phrase (in connection with the disposition of the proceeds from the minerals) “in which all rights and interests of the tribes are terminated and extinguished by the terms and conditions of section 1 of this Act * * *”. This suggested amendment was later adopted by the Congress and appears in section 5 of the Act as enacted, which fact is clearly indicative of the intent of Congress that the provisions of said section 5 were not to be construed as having the effect of retaining in the tribes any right or interest in these minerals. On the contrary, adoption of this amendment to section 5 indicates that Congress intended to make it clear that full title to the

minerals was to pass to the United States, subject only to their directive regarding the disposition of the receipts therefrom.

It is also noted that this interpretation of the Act was brought to the attention of the Subcommittee on Indian Affairs of the Senate during hearings on the legislation. Thus, at page 11 of the Report of Proceedings before the Senate Subcommittee on Indian Affairs considering H. R. 3476, 83rd Cong., 1st Sess. (later superseded by H. R. 4483, 83rd Cong., 1st Sess.), there appears the following testimony by Mr. Samuel Flickinger, then Assistant Chief Counsel, Bureau of Indian Affairs:

"Mr. Flickinger. * * *

"Now under this Act it is provided that all the right, title and interest of the Indians will be disposed of to the United States. *That will include the oil interests and all other interests.*

"We are suggesting an amendment to section 1 of the Act which will protect the interests of the Indians with respect to their rights in the oil, *not by retaining the interest of the Indians in the oil and gas*, but by paying to the Indians, the United States paying to the Indians a royalty of 90 percent of the income received from such development.

"Now the reason for this is that the Indians through the Indian Office desire to step out insofar as this particular area is concerned to have nothing further to do with the operations. * * *

"The Indians, both tribes, in cooperation and activity of their attorneys have agreed to the measure." (Emphasis supplied).

Again at pages 32 and 33 of this Report of Proceedings on the legislation before the Senate Subcommittee, Mr. Flickinger testified as follows:

"Mr. Flickinger: * * *

"At the present time the Indians have leases in the ceded area covering oil and gas and the royalties are paid to the United States for and on behalf of the Indians. The bill provides that all right, title, and in-

terest in and to the lands and the minerals will vest in the United States. The Indian's interest will cease to exist.

"The title, however, both legal title—which, of course is now in the United States—and equitable title, would vest in the United States. The Indians would step out entirely from this area of 171,000 acres." (Emphasis supplied).

Though it is apparent that the tribes were represented at these hearings by their attorneys, we do not find that any attempt was made to object to or correct the interpretation of the legislation given in the above-quoted testimony before the Subcommittee.

From our examination of the legislative history of Public Law 284, including the debates on the floor of both the House and Senate, we fail to find any statement or reference which would indicate that only the surface rights to the lands were to be extinguished, with a reservation of the beneficial ownership of the minerals to the tribes as contended by the protestants. The bills as reported to the Congress and considered on the floor of the House and Senate must therefore be presumed to have the effect which the language of the Act clearly indicates.

With our conclusion that by section 1 of the Act the prior beneficial ownership by the tribes of these lands and minerals was terminated, it necessarily follows that the special leasing authority included in the act of August 16, 1916, *supra*, is clearly inapplicable. The leasing authority of the 1916 Act is applicable only to the undisposed-of ceded lands of the Wind River Reservation in which the tribes retain an interest as beneficial owners. *Florence E. Gallivan, supra*. Since it is our conclusion that such beneficial ownership has, in this case, terminated with enactment of Public Law 284, it is necessary that the Department have other authority for its administration of the minerals in question. This authority is found in section 2 of Public Law 284 providing that the lands described therein "are hereby restored to the public domain for administration, use, occupancy and disposal under the reclamation and public land laws of the United States". Clearly under this lan-

guage the lands became public lands of the United States subject to administration under the public land laws. As one of the public land laws, the Mineral Leasing Act of 1920 is the exclusive authority under which leasable minerals in public lands owned by the United States may be disposed of. (30 U. S. C., secs. 181 and 193). It follows, then, that the leasing of the minerals in these lands under the provisions of the Mineral Leasing Act of 1920 was proper, and that that Act provided the only authority of law by which such mineral leasing could properly be accomplished.

This position is fully confirmed by the express provision of section 5 of the Act providing for the disposition of the receipts "or other proceeds derived *under the mining and mineral-leasing laws of the United States* from any and all lands in which all rights and interests of the tribes are terminated by the terms and conditions of section 1 of this Act * * *". (Emphasis supplied). In addition, this language in terms refutes the protestants' contention that said section 5 "constitutes a continuing recognition of the Indians' beneficial ownership of the minerals". From this section it is apparent that the lands were to become subject to the general mining and leasing laws of the United States in the same manner as other public lands, subject only to the special provision for the disposition of the receipts.

As used in section 5 of the Act, the terms "mining and mineral leasing laws of the United States" obviously have reference to the general public land and mineral laws of the United States rather than to any special leasing law such as the 1916 Act, referred to above. These terms as used in the single phrase are *in pari materia* and must be construed together. If it could be said that the Indians retained beneficial ownership of the minerals in these lands, they would not be subject to location, entry, and patent under the mining laws, and no effect could be given to that portion of the Act. (43 U. S. C., sec. 22). Congress cannot be presumed to have intended that its express reference to the mining laws was to be meaningless. Therefore, the reference to the mining laws must be said to have been to the *general* public land mining laws of the United States. In *Oklahoma v. Texas*, 258 U.S. 574 the Supreme Court

held that the mining laws are a part of the body of public land laws which have never been held to extend to other than public lands *belonging to the United States*, at least in the absence of explicit and express language so extending them to other lands.

It follows, then, that if the phrase "mining and mineral leasing laws of the United States" is to be construed as a whole, the reference to the mineral leasing laws must also be held to refer to the general leasing laws. If Congress had intended that a special [Indian land] leasing act applicable only to those particular lands was to apply, it can reasonably be said that express reference to such a special act would have been made. Concerning Indian reservations, Indian lands, and Indian affairs generally, Congress habitually acts only by legislation expressly and specifically application thereto. *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U.S. 114. With regard to the disposition of minerals in Indian lands Congress down through the years has enacted a separate and distinct system of law comprising voluminous legislation, much of it relative to particular reservations such as the 1916 Act referred to herein. Certainly this body of special legislation applicable only to certain Indian lands in which the Indians have a real or beneficial interest cannot be said to comprise any portion of the "mining and mineral leasing laws of the United States" as that phrase is used in section 5 of Public Law 284.

It should also be pointed out that in 1924 the Attorney General of the United States expressly held that the general mineral leasing act of 1920 was not applicable to executive order Indian reservations for the reasons, *inter alia*, that such lands were not public domain lands and were not owned exclusively by the United States. (34 *Op. Atty. Gen.* 171). Conversely, it must be held that if the lands here under consideration *are* public domain lands owned exclusively by the United States, the general leasing act of 1920 is applicable, to the exclusion of other special legislation. By section 2 of Public Law 284, these lands were in fact restored to the public domain for administration, use, occupancy, and disposition under the reclamation and public land laws of the United States. Therefore, the lands hav-

ing achieved the status of public lands by legislative fiat, are subject to the leasing act exclusively applicable to public lands of the United States.

From the above it seems clear that the leases heretofore issued by the Department for the lands described in Public Law 284 were properly issued under the authority of the Mineral Leasing Act of 1920. These leases therefore constitute binding contracts between the United States and the lessees, which contracts are not subject, to arbitrary cancellation. In these circumstances the protestants' prayer that the outstanding leases be canceled must be denied.

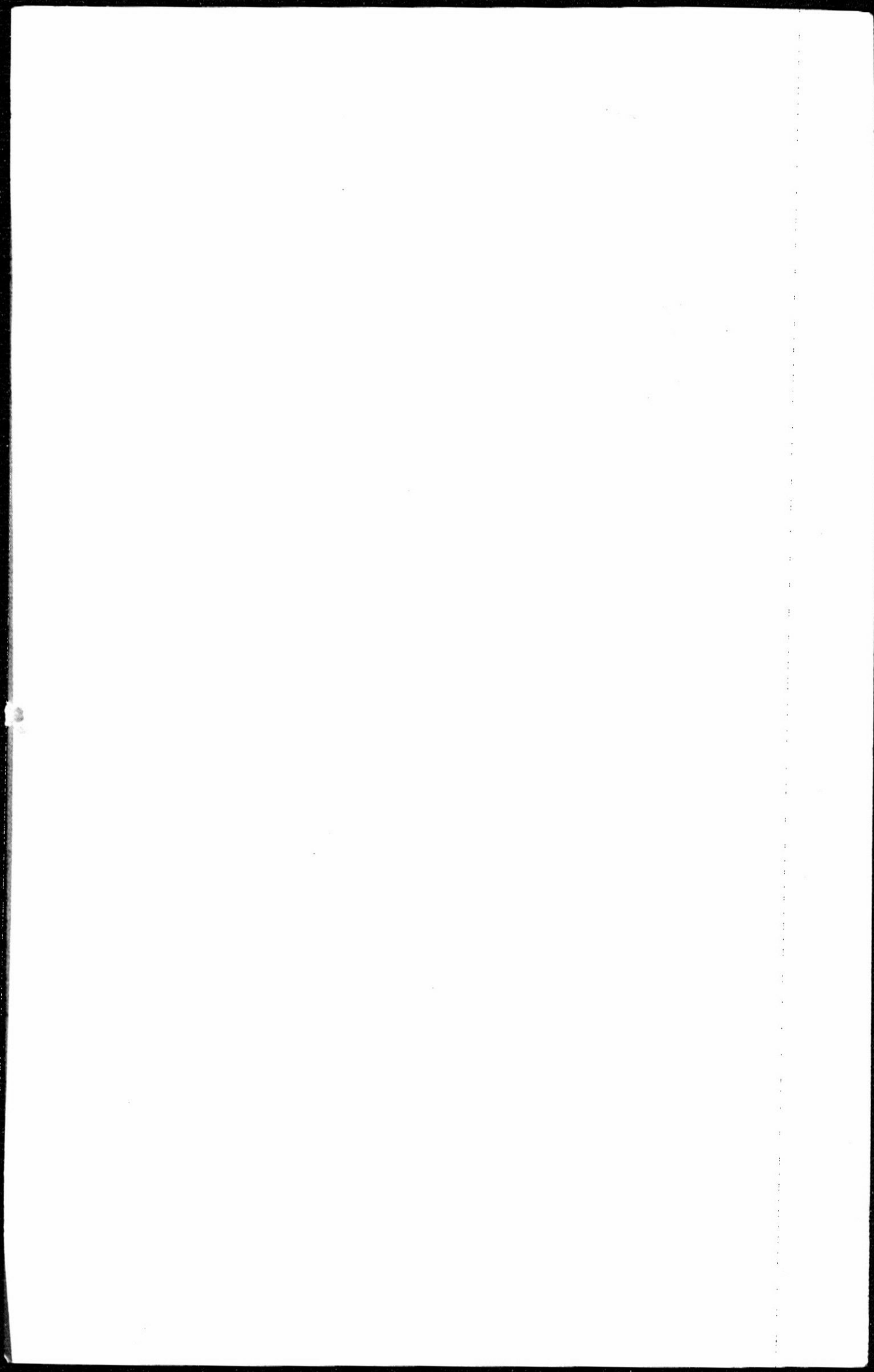
In view of our conclusions that the Mineral Leasing Law of 1920 is applicable to the minerals here being considered, protestants' prayer that all pending applications therefor be rejected must also be denied. The question of the applicability of the special mineral leasing act of August 21, 1916, *supra*, has heretofore been decided in the negative.

For the reasons stated herein the protest of the Shoshone and Arapahoe Tribes of Indians is rejected in its entirety.

DOUGLAS MCKAY,
Secretary of the Interior.

September 22, 1955.

(3257-3)



**BRIEF FOR FRED A. SEATON, SECRETARY OF
THE INTERIOR, APPELLEE**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13634

**UNITED STATES EX REL. THE SHOSHONE INDIAN TRIBE, ET AL.,
APPELLANTS**

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

No PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAR 8 1957

Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

1. Whether a 1953 Act which "terminated and extinguished all of the right, title, estate and interest, including minerals, gas and oil" of Indian tribes in certain lands and restored those lands to the "public domain for administration, use occupancy, and disposal under the reclamation and public land laws of the United States" with the provision that 90 percent of the proceeds "derived under the mining and mineral-leasing laws of the United States" should be paid to the Indians, constituted a positive command to the Secretary of the Interior to administer oil and gas leasing under the special Act of 1916 governing such activities on these particular lands when the lands were beneficially owned by the Indians, rather than under the Mineral Leasing Act of 1920, as amended, which is generally applicable to public lands of the United States.

2. Whether a court may cancel mineral leases when it has no power to bind the parties to the contracts and conveyances by its decree.

(3)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13634

UNITED STATES EX REL. THE SHOSHONE INDIAN TRIBE, ET AL.,
APPELLANTS

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA*

**BRIEF FOR FRED A. SEATON, SECRETARY OF
THE INTERIOR, APPELLEE**

OPINION BELOW

The opinion of the district court (Jt. App. 17) is not reported.

JURISDICTION

This is a suit against the Secretary of the Interior by the Shoshone Indian Tribe, the Arapahoe Indian Tribe and the chairman of the governing body of each, seeking a declaration that certain lands were not subject to the provisions of the Mineral Leasing Act of February 25, 1920, as amended, and ordering cancellation of leases issued under that Act (Jt. App. 7). The jurisdiction of the district court was alleged to be under the general jurisdictional provisions of Title 11, Section 306, of the District of Columbia Code and upon the ground that the matter arose under the laws of the United States (Jt. App. 2). Judgment of dismissal was entered September 6, 1956 (Jt. App. 19) Notice of appeal was filed November 1,

1956 (Jt. App. 19). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

COUNTERSTATEMENT OF THE CASE

Appellants' statement of the case is replete with legal arguments, assumptions as to legal conclusions, unsupported factual assertions and irrelevant matters which can only appeal to emotions. The facts material to the present appeal, as alleged in the complaint and supplemented by public record, are as follows:

By the Act of March 3, 1905, 33 Stat. 1016, Congress ratified an agreement whereby lands in the Wind River Reservation in Wyoming, which were owned jointly by the Shoshone and Arapahoe Tribes, were ceded to the United States. All of the proceeds from the sale of these lands "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash" at designated prices were to be held in trust for the tribes. In 1916 Congress authorized the Secretary of the Interior to lease lands within this "ceded" area of the Reservation for oil and gas purposes "under such terms and conditions as shall be by him prescribed." Act of August 21, 1916, 39 Stat. 519 (Br. App. 53-54). The Act provided a minimum royalty of 1/10, advance rental of not less than \$1.00 per acre per year and that the leases should be for 20 years with a preferential right of renewal. The proceeds were to be applied first to extinguishment of debts of the Shoshone Tribe to the United States and thereafter applied to the use of the tribe as though secured from the sale of lands under the 1905 Act.

About 332,000 acres of the ceded land were reserved for reclamation purposes and the Riverton Reclamation project had been constructed thereon under the Act of June 5, 1920, 41 Stat. 874, 915 (Jt. App. 3). By 1953 the tribes had been compensated for about 100,000 acres within the project which had been disposed of under the public land and reclamation laws. In administration of the project for 33 years there had accumulated problems as to compensation of the tribes for lands used for canals, ditches, roads, the Pilot Butte Reservoir and Ocean Lake. Sand, gravel, and other materials had been

removed, both for reclamation purposes and for local governmental purposes. To settle all such matters, after an appraisal had been made, the Act of August 15, 1953, 67 Stat. 592, was passed. By section 4 some 70,000 acres of land outside of the Riverton project were restored to tribal ownership. The remaining 161,000 acres, which is not a solid block but is interspersed with other lands, is the subject matter of this litigation.

The Act provides (section 1) that \$1,009,500 should be credited to the tribes

and shall be deemed to constitute full, complete, and final compensation, except as provided in section 5 of this Act, for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to the lands, interests in lands, and any and all past and future damages arising out of the cession to the United States, pursuant to the Act of March 3, 1905 (33 Stat. 1016) of that part of the former Wind River Indian Reservation lying within the following described boundaries: [description appearing in statute here omitted].

Section 2 (p. 612) restored unentered and vacant lands to the public domain for administration, use, occupancy and disposal under the reclamation and public land laws. Section 5 (p. 613) provided that the United States should deposit to the credit of the tribes 90% of the gross receipts "from all leases, bonuses, royalties, or other proceeds derived under the mining and mineral-leasing laws of the United States" from lands described in section 1.

Subsequently, applications were made and oil and gas leases were issued under the Mineral Leasing Act of 1920, as amended, through the Bureau of Land Management of the Department of the Interior. Since the lands were not within a known geologic structure, the leases were issued to the first applicant and not as a result of competitive bidding. In March 1955 counsel for the two tribes wrote letters to the Secretary of the Interior protesting the issuance of such leases. They contended that leasing should be pursuant to the 1916 Act and regulations thereunder, wherein competitive bidding

was employed, and it was averred that the tribes were injured by the loss of substantial bonuses (Jt. App. 8-13). They referred to nine leases prior to the 1953 Act of 5,100 acres (revised downward in the brief (p. 9) to 4,400 acres) for bonuses totaling \$667,171 (Jt. App. 9). The Assistant Secretary of the Interior replied on April 22, 1955, stating that the leases were validly issued and were not subject to cancellation (Jt. App. 14-16). A few days later protests were filed with the Director of the Bureau of Land Management, copies were served on 48 lessees and their answers made part of the record. The Secretary, at the request of the tribes, assumed immediate jurisdiction of the matter. The grounds of the protests were considered at length and, by opinion of September 22, 1955, the Secretary rejected them, holding that the leases were validly issued and were not subject to arbitrary cancellation (Br. App. 58-68).

This proceeding was instituted by complaint filed November 10, 1955, seeking a preliminary injunction against approval of assignments of leases, a declaration that the lands were not subject to oil and gas leasing under the Mineral Leasing Act and a direction that the Secretary cancel all leases issued under that Act. Defendant moved to dismiss, attaching as Exhibit A to the points and authorities in support of the motion a copy of the Secretary's opinion referred to in the complaint, but not attached thereto (Jt. App. 6, 16, 20).

After briefing and argument (Jt. App. 20) the court granted the motion. It held that Congress in the 1953 Act placed the lands within the public domain, hence the 1916 Act no longer applies. The court held that, while a liberal construction should be had in favor of Indians, this rule cannot overcome the plain meaning of plain words in a statute and courts have no power to remake or redraft them (Jt. App. 17). Appellants' motion for reconsideration was denied and this appeal followed (Jt. App. 18-20).

SUMMARY OF ARGUMENT

I

A. The 1953 Act is not susceptible to any construction except that oil and gas in the lands covered thereby are to be leased

under the provisions of the Mineral Leasing Act of 1920, as amended and supplemented, which generally governs public lands. These were the laws explicitly referred to in section 5 of the Act—which is the sole basis of appellants' case—when Congress spoke of proceeds derived “under the mining and mineral-leasing laws of the United States.” This follows from both customary usage by Congress and the courts in this field of legislation but also when regard is had to the specific statutes (1905 and 1916) formerly controlling this land. It is absurd to attribute to Congress an intention to adopt the 1916 Act, of which it was well aware, when it said mineral leasing laws of the United States. This should, without more, conclude the case.

It is equally clear that the 1953 Act does not, as appellants claim, terminate and extinguish their interest in the surface only, leaving them with a property interest in all minerals. The language of section 1 “terminating and extinguishing all of the right, title, estate and interest, including minerals, gas and oil * * *” cannot be read as excluding “minerals, gas and oil.” Nor can section 2, which provides that “unentered and vacant lands * * * are hereby restored to the public domain for administration, use, occupancy, and disposal under the reclamation and public land laws of the United States * * *,” be “interpreted” to mean that the “surface of the unentered and vacant lands, excluding minerals, oil and gas” are so restored. The mining and mineral leasing laws govern such matters and are the appropriate “public land laws of the United States.”

B. The legislative history of the 1953 Act confirms the view that Congress was advised that the effect of the Act would be to terminate all property interest of appellants in the minerals and consequently shows that the Act means what it says.

C. The authorities cited by appellants do not show that there is a constitutional prohibition upon Congress from terminating all property interest of the Indians in the minerals, yet distributing to them whatever proceeds may accrue therefrom. Consequently those authorities are irrelevant.

D. Rules of construction of statutes to the effect that they should be interpreted favorably to the Indians do not justify

rejection of their plain meaning nor empower courts to amend them. In this connection it is by no means so clear as appellants would make it seem that the application of the 1916 Act rather than the Mineral Leasing Act will, in the long run, be most advantageous to the Indians.

II

Absent an unmistakable direction by Congress that the Secretary administer the oil and gas leases under the 1916 Act, and the 1953 Act contains no such direction, intervention by the courts in this administrative matter is not warranted.

III

Contracts and conveyances of property rights—mineral leases have both aspects—cannot be canceled by a court whose decree will not bind the parties to such conveyances and contracts. Otherwise there may be contradictory decrees by different courts making action wrongful whatever course is taken.

ARGUMENT

I

The Secretary of the Interior and the district court correctly held that the Mineral Leasing Act of 1920, as amended, governed oil and gas leasing of the lands involved

A. *The 1953 Act is clear and conclusive.*—In this case there is no room for construction or interpretation because the statute is explicit and precisely covers the exact question here presented.

1. *"Mining and mineral-leasing laws of the United States" mean the general mining laws and the Mineral Leasing Act of 1920, as amended.*—Section 5, without which appellants would not have even the semblance of an argument, provides for the payment to them of 90% of the gross receipts "from all leases, bonuses, royalties or other proceeds derived under the mining and mineral-leasing laws of the United States from any and all lands in which all rights and interests of the tribes are terminated and extinguished by the terms and conditions of section 1 of the Act * * *." In Title 30 U. S. C., entitled "Mineral Lands and Mining," there are collected the general laws as to

mining and mineral leasing of oil and gas and of many other minerals. An important part thereof is the Mineral Leasing Act of 1920 with its many supplements and amendments, 30 U. S. C. sec. 181 *et seq.* It is this body of law which was meant by the reference "mining and mineral-leasing laws of the United States."

These provisions usually apply to lands owned by the United States which are "public lands." *Justheim v. McKay*, 97 U. S. App. D. C. 146, 229 F. 2d 29 (1956) certiorari denied, 351 U. S. 933. Congress may, however, extend them to other than public lands. An outstanding example where it did so was the Acquired Lands Act where in making the mineral leasing laws applicable to acquired lands, with variations in specific details, it defined "mineral leasing laws" as 30 U. S. C. sec. 181 *et seq.* and 48 U. S. C. secs. 432-452. The mining laws of the United States have a much longer history, traceable to the Act of July 26, 1866, 14 Stat. 251. The opinion in *Oklahoma v. Texas*, 258 U. S. 574 (1922), where Mr. Justice Van Devanter repeatedly refers to "the mining laws" (pp. 599, 600, 601) when he is talking about the mining laws applicable to public lands, disposes of appellants' claim (Br. 40) that an adjective such as "general" or "public" must be used to refer to those laws, and illustrates the fact that the phrase "mining and mineral-leasing laws of the United States" means that body of laws generally applicable and not the special Indian statutes or the particular statute, the 1916 Act, formerly applicable to the lands here in question. Appellants' discussion (Br. 42-44) of *Oklahoma v. Texas*, 258 U. S. 574 (1922); *West v. Work*, 56 App. D. C. 191, 11 F. 2d 828 (1926); and *Justheim v. McKay*, 97 U. S. App. D. C. 146, 229 F. 2d 29 (1956) certiorari denied, 351 U. S. 933, is addressed to the entirely different issue (discussed later herein) whether particular lands such as those in *Oklahoma* (*Oklahoma v. Texas* and *West v. Work*) or the marginal sea lands (*Justheim v. McKay*) were public lands within the meaning of the mining and mineral leasing laws. It does not and cannot controvert the fact that the single Supreme Court Justice most learned in this subject and most precise in his language continuously used "the mining laws" to mean mining laws generally applicable to public lands.

To read the phrase in the 1953 Act as meaning the 1916 Act or possibly the Act of May 29, 1924, 43 Stat. 244, 25 U. S. C. sec. 398 (Br. 3), would thus be a denial of history of federal law as to minerals and the established usage thereunder.¹ Appellants are driven to a contradiction in their attempt to rationalize their conclusion. As the departmental decision pointed out (Br. App. 66), there is no justification for giving the term "mineral-leasing" a different or narrower meaning than its companion term "mining," both adjectives referring to "laws of the United States." But the 1916 Act says nothing about mining or about leasing minerals other than oil and gas. Hence to read the 1953 Act as referring to the 1916 Act simply deletes this part of the Act. To avoid this result of their argument appellants revert to the 1905 Act which referred to provisions of "coal and mineral land laws" and thereby, appellants say, subjected all minerals in the ceded lands to disposal under the public land laws (Br. 42). Here is recognition by appellants themselves that the qualifications "general" or "public" are not essential to refer to that body of statutes governing mining and mineral leasing. No justification, other than counsel's desire to reach a result, can be given for concluding that "mining" laws in the 1953 Act, rather than meaning the general mining laws, referred to the 1905 Act which in turn adopted the general mining laws by saying "coal and mineral land laws."²

Appellants' argument (Br. 15, 40, 48) that use of the word "bonuses" in section 5 necessarily refers to the 1916 Act because no bonuses could ever have been collected under the Mineral Leasing Act and "If the Secretary's decision stands, all right to bonuses is forever gone" (Br. 40) is wrong because it is based on false assumptions of fact. The Mineral Leasing Act does

¹ The reliance (Br. 3) on the Act of May 11, 1938, 52 Stat. 347, 25 U. S. C. sec. 396b, demonstrates the extremes to which appellants will go in search of support for their position. Section 6 of that Act, 25 U. S. C. sec. 396f, expressly stated that the Act "shall not apply to * * * the ceded lands of the Shoshone Reservation in Wyoming."

² Appellants' attempt (Br. 3) to invoke the Act of May 29, 1924, 43 Stat. 244, 25 U. S. C. sec. 398, which governs oil and gas leases of unallotted lands, creates a direct conflict with the 1905 Act. The 1924 Act applies to lands subject to leasing for mining purposes under the proviso of Section 3 of the Act of February 28, 1891, 26 Stat. 795. The statute (25 U. S. C. sec. 397) governs leases for grazing and mining purposes. To apply the 1924 Act would thus create a conflict in the statutes relating to other minerals.

provide for competitive bidding and will return bonuses if at the time of leasing the land is within a known geological structure of a producing oil and gas field. At the time the Act was passed it was quite reasonable to assume that this provision might become applicable as to some of the 161,000 acres. And the possibility of bonuses is not gone forever. The leases are of limited duration if there is no production thereunder and it is not at all unlikely that some will expire, leaving a possibility of subsequent bonus leasing.

Common sense compels a rejection of appellants' argument that section 5 has reference to the special 1916 Act. When a statute was in existence specifically controlling oil and gas leases on these lands it would obviously have been referred to had it been meant to apply. In these circumstances the use of the general phrase having an established meaning is the equivalent of a denial of application of the 1905 and 1916 Acts. This is not, as appellants would have it (Br. 42), a case where a special statute controls rather than a general statute covering the same subject matter. The 1953 Act is the specific statute and the adoption by Congress of the usual mineral provisions precludes operation of the 1916 Act. Nor is this, as appellants would have it (Br. 32, 37, 52), a case of repeal of the 1916 Act by implication. These particular lands are simply removed from the category of property covered by the 1916 Act.

We submit that in section 5 Congress has explicitly directed that the Mineral Leasing Act of 1920 as amended shall govern leasing of these lands. This, itself, precludes adoption of appellants' position and should end the controversy since Congress may, of course, apply the mineral leasing laws to lands other than the public domain if it so desires (*supra*, p. 7).³ However, as we shall now show, the fact is equally clear that the 1953 Act incorporates the land in question in the public domain and, thereby, renders it subject to the laws usually applicable to the public domain including the Mineral Leasing Act of 1920 as amended.

2. *The 1953 Act incorporated the lands in the public domain, extinguished all Indian interests and thereby subjected them to the Mineral Leasing Act of 1920 as amended.*—Sec-

³ For these reasons, we do not concur in appellants' statement (pp. 13-16) as to what it considers to be conceded.

tion 1 of the Act states that the \$1,009,500 is full compensation, except as provided in section 5, "for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes * * *." Section 2 says that "Subject only to the existing rights and interests which are not extinguished and terminated by this Act,⁴ all unentered and vacant lands * * * are hereby restored to the public domain for administration, use, occupancy and disposal under the reclamation and public lands laws of the United States * * *." And section 5 deals with proceeds from lands "in which all rights and interests of the tribes are terminated and extinguished by the terms and conditions of section 1."

More definite, explicit and unambiguous language could hardly be imagined by which to say that all interest of appellants in these lands had been extinguished. While they talk in terms of construction or interpretation of the statute appellants' argument simply denies the existence of this absolute language. They seek to accord the language a different effect as to the surface and as to minerals. But Congress in stating "all of the right, title, estate and interest, including minerals, gas and oil" has precluded any such distinction. Having deleted "including minerals, gas and oil" from section 1, appellants are next required to adopt a meaning of "unentered and vacant lands" as limited to the surface of the lands. This itself is a very unusual and strained usage contrary to that employed twice by Congress as to these particular lands. In the 1905 Act the Indians ceded to the United States their interest "to all the lands embraced within the said reservation." Act of March 3, 1905, 33 Stat. 1016. The 1916 Act authorized the Secretary "to lease, for the production of oil and gas therefrom, lands * * *" (Br. App. 53). "Lands" as meaning surface only (Br. 37-38) is, thus, inconsistent with previous usage as to this particular area. This fact simply highlights the extremes to which appellants would have the court go in torturing language out of its normal meaning and

⁴By section 4 some 70,000 acres of land were restored to tribal ownership and section 1 recognized certain rights in members of the tribe, etc. (Br. App. 54-56).

in deleting words which no process of "construction" can explain away.

B. *The legislative history of the 1953 Act confirms the fact that it means what it says.*—For the convenience of the Court the report of the Senate Committee on the bill, omitting statutory quotations, is set out in the Appendix hereto, *infra*, pp. 20–29. It quotes the 1905 and 1916 Acts verbatim showing that Congress knew their provisions and confirms the thought that those Acts would have been specifically cited had that been the meaning of "mining and mineral-leasing laws." This is further confirmed by the Legislative practice with regard to Indian matters emphasized in the departmental decision (Jt. Br. App. 67).

The Committee adopted all amendments proposed by the Department of the Interior and expressed no disagreement with the understanding, stated in the Department's letter, that "the bill would extinguish the tribes' interests in and to all of the oil, gas and other mineral resources, as well as the surface resources * * *" (p. 25, *infra*). This same understanding was, as shown by the departmental decision, expressed at the Senate hearings on the legislation (Jt. Br. App. 64–65). Appellants can find nothing in the legislative history to the contrary.

C. *Congress is not prohibited from extinguishing all Indian interests in the land because it provides for payment to them of any proceeds from minerals therein.*—Appellants' argument that the mineral interests are held in trust for them rests solely on the fact that Congress provided for payment to them of 90 percent of the proceeds from the minerals.⁵ Since the express intention of Congress to extinguish the Indians' title to all interests in the land is perfectly clear appellants' argument actually is that Congress lacked power to do so. The absence of any such constitutional prohibition is apparent from no more than a glance at *Ash Sheep Co. v. United States*, 252 U. S.

⁵ As the letter from the Assistant Secretary of the Interior printed in the committee report states (p. 25, *infra*): "The remaining 10 percent presumably would be retained by the United States as compensation for the expenses of administration." We ignore as completely irrelevant appellants' attacks upon the general policy as to the amount of such deductions for expenses (Br. 18–19, fn. 12) and will not burden this Court with a reply thereto.

159 (1920), the leading decision on this subject. The very first step in the court's reasoning was that (p. 164):

Whether or not the Government became trustee for the Indians or acquired an unrestricted title by the cession of their lands, depends in each case upon the terms of the agreement or treaty by which the cession was made. *Minnesota v. Hitchcock*, 185 U. S. 373, 394, 398; *United States v. Mille Lac Band of Chippewa Indians*, 229 U. S. 498, 509.

The opinion then refers to many provisions of the agreement, which went so far as to require the Secretary of the Interior to make reports to the Indians. The court concluded that the agreement contained many features appropriate to a trust to sell the lands and devote the proceeds to the *cestui que trust* and said (p. 165):

And that this was precisely the light in which the Congress regarded the whole transaction, is clear from the terms of the concluding section, the eighth:

"That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided." (33 Stat. 352, 361.)

The power of Congress in such matters was explicitly stated in *Morrison v. Work*, 266 U. S. 481 (1925), cited by appellants (Br. 27), where the court said (p. 485): "It is admitted that, as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare." It would be fruitless here to pursue the mass of statutes and decisions cited by appellants (Br. 19-31), none of which deny the power of Congress to enact the 1953 Act and which were, therefore, properly ignored by the court below (cf. Br. 30).

The fact that appellants in urging their "relinquishment in trust" theory as applied here are in truth attacking the power of Congress is obvious from another consideration. These lands had already been "relinquished in trust" by the 1905 Act. To say that the 1953 Act was merely a relinquishment in trust would thus render it meaningless. Appellants seek to avoid this absurdity by separating surface and minerals and arguing that here there was a "cession" of the surface but merely a relinquishment in trust of the minerals (Br. 18, *et seq.*). But as to minerals the 1953 Act would, under appellants' view, accomplish nothing since they had already been relinquished in trust. This result requires not only separation of surface and minerals and rewriting the statute accordingly, but also requires deletion from section 1 of the words "including minerals, gas and oil." There is, we submit, no constitutional principle which so limits the power of Congress.

D. *The principle that doubts are to be resolved in favor of the Indians does not permit rejection of the plain meaning of language.*—Appellants invoke at length (Br. 44–51) authorities to the effect that Indian treaties and statutes are to be construed favorably to the Indians. In *United States v. Mil. Lac Chippewas*, 229 U. S. 498 (1913), Mr. Justice Van Devanter, adverting to an argument as to the Indians' understanding of the agreement, stated that (p. 508) "the Indians, no less than the United States, are bound by the plain import of the language of the act and the agreement." And, of course, the Secretary of the Interior has no power to amend the statute when the direction of Congress is plain. The district court was stating the obvious when it said (Jt. App. 17):

True, it is the rule that in construing statutes relating to Indians, a liberal construction in their favor is to be indulged in, but this rule of construction cannot be invoked for the purpose of overcoming the plain meaning of plain words used in such legislative enactments, and Courts have no power to remake or redraft them. *United States v. First National Bank*, 234 U. S. 245, at 260.

It follows that appellants' assertions and counsel's mathematical calculations designed to show that leasing under the 1916 Act would produce a far greater return than operation under the mineral-leasing laws should be addressed to Congress and not to the Secretary of the Interior or to the courts. However, we believe it to be appropriate to point out the factors, ignored by appellants, which might well lead to the contrary conclusion. Leases under the 1916 Act are for a primary period of 20 years with a preferential right of the lessee to renewals and are irrevocable except for breach of their conditions (Br. App. 53-54). In contrast, under the Mineral Leasing Act of 1920, leases are for a primary term of five years renewable for a maximum of five additional years. 30 U. S. C. sec. 226. There is, therefore, much greater inducement to the lessee to prospect and drill for oil under the Mineral Leasing Act. The encouragement of such drilling and consequent actual production is one of the most important factors in any oil and gas leasing program in a "wild-cat" area. Appellants' contention only applies to such an area, since the Mineral Leasing Act of 1920 provides for competitive bids when there is a known geologic structure. Indeed, the experience as to this area indicates the need for some inducement to drill. Although the matter was considered to be of sufficient importance to justify passage of a special statute in 1916, only nine leases covering about 4,400 acres had been made during the ensuing 37 years (Br. 9, Jt. App. 9). Subsequent to the 1953 Act the entire 161,500 acres were leased. The bonuses upon those nine leases, so much emphasized by appellants, may well have been largely influenced by the fact that the 20-year term gives the lessee the speculative possibility of profits without any immediate obligation to develop minerals. It might well be that the encouragement of drilling and hence the increased possibility of securing producing royalties will ultimately be of far greater benefit to appellants than bonuses immediately available.*

* Appellants' 10 or 12 million dollar figure of potential bonuses (Br. 48) is extremely speculative. The average bonus per acre of such a small quantity as nine leases obviously means very little. And the bulk of them is represented by only two leases (Nos. 5 and 7, Br. 9). In view of the lack of past activity it is certainly very doubtful how much could have been obtained in the way of bonuses for the whole area.

A related matter is the assertion made in the second sentence of appellants' statement, and reiterated many times in the brief, that the United States bought only the surface (Br. 2, 9, 13, 28, 33, 34, 38). This is based on the claim that the \$1,009,500 was founded upon an appraisal of only the surface of the land (Br. 2, 8, 33, 36). But, as the trial court said, "Since it appears that these lands are not within a presently known geologic structure, obviously the only appraisal which could be made was that of their surface use value" (Jt. App. 17). The committee report shows that, as any proper appraisal must, the one here was based upon a highest and best use for agricultural and grazing purposes "taking into consideration recent sales of private lands of a similar quality in the general vicinity" (p. 24, *infra*). The appraisal was not simply limited to surface. It included two bodies of water, totaling 7,500 acres, and also compensation for sand, gravel and other building materials which had been removed. It would have been pure speculation to attempt to appraise the extent of possible mineral deposits. This was avoided by giving the Indians the proceeds from whatever mineral development there might be. The assertion that the Indians (or anyone else) knew of immediate potential bonuses of 10 or 12 million dollars which were excluded from the appraisals because they were only of the surface is thus the figment of counsel's imagination, not fact. It is unreasonable to suppose that a potential value of such magnitude was known but went unmentioned throughout the legislative proceedings at which the tribes were represented by their attorneys (Br. App. 65).⁷

The charges that the appellants were mislead and that "trick language" was employed by departmental attorneys in drafting the bill, which would leave room for a "legal twist" in the departmental decision (Br. 48-49), are, we submit, completely unwarranted and constitute an entirely unjustified attack upon the good faith of government employees. It is parallel to appellants' extended references to transactions more than 80

⁷ The paragraph at page 8 of appellants' statement narrating background of the 1953 Act and stating that the parties understood mineral matters to be completely unaffected is merely counsel's assertion without any indication of support in hearings or elsewhere.

years ago, including a finding of the Indian Claims Commission in a case which is not yet final and is subject to review, that the consideration for a transaction at that time was unconscionably small (Br. 3-4; Br. App. 57). These matters could be relevant only to an attempt to imply, on a "bad man" theory, that government officials, including apparently members of the committees of Congress, were acting to despoil the Indians in 1953 (Br. 49). The allegation in appellants' brief (p. 49) that the Secretary is violating "high standards of justice, morality and fair play" should not, we submit, be countenanced by this Court.⁸

II

The statute is not so unequivocal as to impose a ministerial duty to take the action appellants seek

The limited function of the courts with regard to administrative decisions, particularly in connection with land matters, has been so often restated as to require little elaboration here. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324-325 (1903). Congress has not provided any general review by the courts. It is only in those instances where the administrative official has refused to follow a Congressional direction, which is so clear as to be the equivalent of a positive command, that the courts may interfere by granting relief in the nature of mandamus. *Hammond v. Hull*, 76 U. S. App. D. C. 301, 303, 131 F. 2d 23, 25 (1942), certiorari denied, 318 U. S. 777, and cases there cited. "Where the matter is not beyond peradventure clear we have invariably refused the writ, even though the question were one of law as to the extent of the statutory power of an administrative officer or body." *United States ex rel. Chicago Gr. W. R. R. v. Interstate Commerce Commission*, 294 U. S. 50, 61-63 (1935); *United States ex rel. Roughton v.*

⁸ Completely unsupported attacks upon the good faith of various government officers are likewise made at other places in appellants' brief where a passage of the departmental decision is called a "pretense of objective innocence" (Br. 36) and appellants' argument as to section 2 is claimed to dissolve "the thin fabric by which the Secretary has undertaken to impair the rights of the Indian wards * * *" (Br. 39). Elsewhere appellants speak of dealing "so cavalierly with the property of the wards of the United States" and say that the obligations of the guardian to the ward "may not be conveniently shed for the purpose of disposing of Indian property as if it were public land owned by the United States * * *" (Br. 51).

Ickes, 69 App. D. C. 324, 329, 101 F. 2d 248, 253 (1938); *Chapman v. Santa Fe Pac. R. Co.*, 90 U. S. App. D. C. 34, 198 F. 2d 498, 502 (1951), certiorari denied, 343 U. S. 964. Recently, in *Anderson v. McKay*, 94 U. S. App. D. C. 11, 21, 211 F. 2d 798 (1954), this Court said: "But it is established beyond the necessity for citation that the courts cannot control by *mandamus* the nature of decisions entrusted by Congress to executive officials."

We submit that, as a very minimum, the departmental view of the statute was "permissible, even if not inevitable." *Chapman v. Sheridan-Wyoming Co.*, 338 U. S. 621, 631 (1950). Appellants seemingly argue that there is a broader scope of review when the complaining parties are Indians. Congress has never so provided. The authority of the Secretary of the Interior over Indian matters was well summarized in *United States v. Anglin & Stevenson*, 145 F. 2d 622, 628-629 (C. A. 10, 1944), certiorari denied, 324 U. S. 844 (1945):

We do not forget that historically and traditionally the Secretary of the Interior has been selected as the executive arm of the Government to execute the declared Congressional policy with the Indians. As such, he and his subordinates have the responsibility of discharging the obligation of the Government to its Indian wards, and in that respect, he is given wide discretionary powers to deal with the individual Indians who are dependent upon the Government for tutelage and protection. [Cases omitted.] In the discharge of these duties, he acts as supervisor, agent, guardian, and trustee of the Indian and his property, whether in the nature of lands or restricted funds. While exercising the powers and duties imposed by law, he is clothed with sovereign immunity, and ordinarily is not amenable to judicial processes or bound by judicial decrees absent legislative consent. * * * It is not the judicial function to administer the affairs of incompetent Indians, and courts should be at pains not to invade the trust or encroach upon the prerogative which has been traditionally assigned to the Secretary.

So here, rather than enlarging the scope of review of Executive officers by mandatory relief, the court should be at pains not "to encroach upon the prerogative which has been traditionally assigned to the Secretary."

III

To prevent conflict of judgments, the validity of the issued leases can only be adjudicated in a proceeding wherein the judgment will bind the parties thereto

The present litigation is between appellants and the Secretary of the Interior. Nevertheless the objective sought and the primary relief requested is cancellation of leases which have been issued to many persons or organizations. But neither party to those leases, which are both contracts and conveyances of interests in real property, are parties to this proceeding and they will not be bound by any judgment rendered herein. A conclusion here would not be *stare decisis* in proceedings in some other court where those parties in interest are present. A possibility would be a suit by the lessee against the United States to recover damages for illegal cancellation. The absence of such parties compels, we submit, dismissal of the suit. *Brady v. Work*, 263 U. S. 435, 437 (1924); *Spriggs v. McKay*, 97 U. S. App. D. C. 60, 228 F. 2d 31 (1955). It is no answer to say that, unless the court undertakes to adjudicate the matter here, appellants will be left without remedy. The fact, if it be so, that other courts cannot secure jurisdiction over all interested parties so as to bind them by its adjudication does not justify the courts of the District of Columbia in exercising an equally defective jurisdiction. *Work v. Louisiana*, 269 U. S. 250 (1925), relied upon by appellants, has no tendency to support such an assumption of jurisdiction since no question was presented there of attempted cancellation of contracts or conveyances under which rights might have vested in absent parties.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

Respectfully.

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Washington, D. C.

MARCH 1957.

APPENDIX

CALENDAR No. 645

[83d Congress, 1st Session—SENATE—Report No. 644]

COMPENSATION TO THE SHOSHONE AND ARAPAHOE TRIBES OF
INDIANS FOR CERTAIN LANDS OF THE RIVERTON RECLAMATION
PROJECT, WYOMING.

July 28 (legislative day, July 6), 1953

MR. BUTLER of Nebraska, from the Committee on Interior and
Insular Affairs, submitted the following

REPORT

[To accompany H. R. 4483]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H. R. 4483) providing for compensation to the Shoshone and Arapahoe Tribes of Indians of the Wind River Reservation, Wyo., for certain lands of the Riverton reclamation project, having considered the same report thereon with the recommendation that it do pass, with the following amendments:

On page 2, line 3, delete the second comma and insert the following: "and by the Act of July 17, 1953 (Public Law 132, 83d Congress),".

On page 47, line 9, delete the word "Section" and insert in lieu thereof the word "Station".

On page 59, line 14, strike out the word "such".

On page 59, line 15, strike out the words "payment shall not be" and insert in lieu thereof "the average price of all such lands disposed of by sale shall be not".

On page 60, line 8, change the word "June" to "July" and change the figures "1130" to "1128".

On page 60, line 21, delete the comma and insert in lieu thereof the following: "and by the Act of July 17, 1951 (Public Law 132, 83d Congress),".

On page 61, line 5, after the period insert the following:

Notwithstanding any other provision of law the remaining 10 per centum of such gross receipts shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts.

This bill has been considered by the Committee on Interior and Insular Affairs of the House; on April 14, 1953, that committee submitted its report (H. Rept. No. 269) to the House, recommending its passage, and on April 20, 1953, it passed the House.

EXPLANATION OF THE BILL

By agreement of April 21, 1904, ratified March 3, 1905 (33 Stat. 1016), the Shoshone and Arapahoe Tribes ceded to the United States a large portion of the Wind River Reservation, Wyo.

The said agreement and act of March 3, 1905, reads as follows:

[Here follows complete text]

The act of August 21, 1916, authorizes the Secretary of the Interior to lease for production of oil and gas from lands within the ceded portion of the Wind River Reservation and the proceeds or royalties arising from any such leases be applied to the use and benefit of said Indians.

The said act of August 21, 1916, provides, as follows:

[Here follows complete text]

The construction, under the Federal reclamation laws, of the Riverton project on lands within the ceded portion of the Wind River Reservation was authorized by a provision in the Act of June 5, 1920 (41 Stat. 874, 915).

The said act of June 5, 1920, provides as follows:

[Here follows complete text]

The act of March 4, 1921 (41 Stat. 1367, 1404), provides that ceded lands within the Riverton project be sold for \$1.50 per acre and the proceeds credited to the fund for the benefit of the Shoshone and Arapahoe Tribes.

The said act of March 4, 1921, provides, as follows:

[Here follows complete text]

Approximately 332,000 acres of the ceded lands have been reserved for reclamation purposes pursuant to the said Act of June 5, 1920, and the Reclamation Act of June 17, 1902 (32 Stat. 388).

Of the 332,000 acres of the said ceded lands, the Shoshone and Arapahoe Tribes have already been compensated for about 100,000 acres.

The Secretary of the Interior in his report on this proposed legislation dated July 22, 1953, sets forth fully the purposes of this proposed legislation, and among other things, states:

[Here follows complete text]

A similar bill (S. 1077) was introduced in the Senate by Senators Barrett and Hunt, of Wyoming, on which bill the Secretary of the Interior reported favorably if amended as suggested by him. The amendments suggested by the Secretary of the Interior were adopted by your committee and are incorporated in the bill as reported.

The favorable reports of the Secretary of the Interior on S. 1077, dated July 22, 1953, and the report of the Director of the Bureau of the Budget, dated July 3, 1953, and a letter dated May 11, 1953, from the Acting Commissioner of Reclamation concerning the proposed amendment set forth on page 59, line 15, of the bill are attached hereto and made a part of this report, as follows:

DEPARTMENT OF THE INTERIOR,
Washington 25, D. C., July 22, 1953.

HON. HUGH BUTLER,

*Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D. C.*

MY DEAR SENATOR BUTLER: I am glad to respond to your request for a report on S. 1077, a bill to provide compensation

to the Shoshone and Arapahoe Tribes of Indians for certain lands of the Riverton reclamation project within the ceded portion of the Wind River Indian Reservation, and for other purposes. Your committee has also requested a report on S. 273, a bill bearing substantially the same title. It is our understanding that S. 273 has been superseded by S. 1077 and that, therefore, a report on S. 273 would no longer be in order.

Subject to several of the amendments which are set forth below, I recommend that S. 1077 be enacted.

S. 1077, if enacted, would extinguish all of the right, title, and interest of the Shoshone and Arapahoe Tribes in and to approximately 161,528 acres of ceded Indian lands described in section 1 of the bill. These lands were originally a part of the Wind River Indian Reservation but were ceded to the United States pursuant to the terms of an agreement dated April 21, 1904, which, as amended, was approved by the act of March 3, 1905 (33 Stat. 1016). Article II of the agreement, as amended, provided for the disposal of the ceded lands under the provisions of the homestead, townsite, coal and mineral land laws, at stipulated prices. It also provided that any lands remaining unsold 8 years after being opened to entry might be sold to the highest bidder for cash without regard to the prices set out in the agreement; that lands disposed of under the townsite, coal and mineral land laws should be paid for at the prices provided by law; and the United States would, in the manner provided in the agreement, pay to and expend for the Indians the proceeds derived from the sales of the lands. To date approximately 100,000 acres of the ceded lands have been disposed of in accordance with the provisions of the public land and reclamation laws and the receipts of the sales have been disposed of in accordance with the provisions of the agreement.

The construction, under the Federal reclamation laws, of the Riverton project on lands within the ceded portion of the Wind River Reservation was authorized by a provision in the act of June 5, 1920 (41 Stat. 874, 915). Approximately 332,000 acres of the ceded lands have been reserved for reclamation purposes in accordance with the provisions of section 3 of the act of June 17, 1902 (32 Stat. 388). Of these 332,000 acres, the

Shoshone and Arapahoe Tribes have already been compensated for about 100,000 acres. Approximately 70,500 acres of reclamation withdrawn lands located outside the boundaries of the reclamation project will, by section 4 of S. 1077, be restored to tribal ownership. This leaves a balance of approximately 161,500 acres of ceded lands within the project boundaries for which the tribes have not been compensated. It is with these 161,500 acres that S. 1077 is principally concerned.

During the past 33 years the Bureau of Reclamation has constructed many miles of canals, ditches, roads, and telephone and transmission lines across the ceded lands and has constructed or utilized Pilot Butte Reservoir and Ocean Lake for the storage of water and control of drainage in connection with the operation and maintenance of the Riverton project. There are about 7,500 acres occupied by these two bodies of water. In addition, considerable quantities of sand, gravel and other building materials have been removed from the ceded lands, both by the Bureau of Reclamation for project purposes and by State and local governmental agencies for roads and other construction purposes. The tribes have not been compensated for these uses of the land.

In an effort to arrive at an equitable disposition of the tribes' interest in the remaining, undisposed ceded lands, negotiations have been conducted for the past year by the tribal attorneys and representatives of this Department. The tribes employed an independent appraiser of considerable experience who conducted a spot appraisal of the lands in question. The appraisal report, based upon the value of the land for agricultural and grazing purposes and taking into consideration recent sales of private lands of a similar quality in the general vicinity, placed an average value on the ceded lands of from \$6 to \$10 per acre. Taking all factors into consideration, including the past use of the lands for reclamation purposes, the removal of construction materials, and the lost of benefits to the tribes for the past 33 years, the compensation proposed in the bill for the 161,000 acres of undisposed, ceded lands—\$1,009,500—appears to be fair and equitable.

It is proposed, if S. 1077 is enacted, to utilize a large portion of the lands for the enlargement of existing farm units or for the resettlement of project settlers. Three bills—S. 199, S. 887,

and H. R. 3371—which would permit this to be done are now pending before the Congress. The establishment of farm units on an irrigation project frequently results in the creation of small, irregular-shaped isolated tracts. Such tracts would, in the present case, be sold to resident project entrymen or land-owners for use in connection with farming operations. They consist mainly of nonirrigable land and are chiefly valuable for grazing or other livestock operations. At the present time there is no authority under which these isolated tracts can be offered for sale to reclamation project entrymen or land-owners. Existing law on the subject is applicable only to public lands and it has been held that ceded Indian lands do not fall within this category. Section 2 of S. 1077 would remedy this situation by placing these lands in the category of public lands.

It is our understanding that the bill would extinguish the tribes' interests in and to all of the oil, gas, and other mineral resources, as well as the surface resources, of the remaining, undisposed ceded lands within the boundaries of the Riverton project, as they would be defined by the bill. It appears to be the intent of the bill that, in lieu of such oil, gas, and other mineral resources, the tribes shall be paid 90 percent of the royalties, bonuses, and rentals received by the United States for the oil, gas, and other minerals in these lands. The remaining 10 percent presumably would be retained by the United States as compensation for the expenses of administration. In order that these matters may be entirely clear, I recommend the following amendments to the bill.

Page 2, line 2, insert: “, except as provided in section 5 of this Act,” after the end of the word “compensation”.

Page 58, line 9, insert: “and subject to section 5 of this Act” after the words “United States”.

Page 60, line 12, delete the expression “terms of now existing mineral reservations,”.

Page 60, line 14, insert: “in which all rights and interests of the Tribes are terminated and extinguished by the terms and conditions of section 1 of this Act and which are” after the word “lands.”

Page 60, line 15, delete the words: “section 1 hereof” and insert in lieu thereof the words “said section 1. Notwith-

standing any other provision of law, the remaining 10 per centum of such gross receipts shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts."

During the construction of the Riverton project it was necessary to destroy certain private irrigation works serving irrigable lands having a vested water right. As a part of the consideration for the removal of these irrigation works, contracts were entered into between the United States and the private parties whereby it was agreed that water would be delivered to such lands at stipulated rates. The tribes subsequently acquired title to these private lands and they are now held by certain tribal members under assignment. The first proviso to section 1 of the bill (p. 57, line 22) would authorize any member, or the heirs or assignees of any member, of either of the tribes who held an existing and valid lease or assignment of any part of such lands on the 24th day of July 1952 to purchase the land within 1 year from the date of the enactment of this bill. I am advised that there are no leases in effect to which this proviso would apply. For this reason, I suggest the following amendments to the bill.

Page 57, line 24, delete the expression "lease, or".

Page 58, line 6, delete the expression "leasehold, or".

Page 58, line 8, delete the expression "lessee or".

Section 2 of the bill deals with the disposition of the lands for which compensation to the Indian tribes is made in section 1. It speaks (p. 59, line 4) of disposal under the "homestead and reclamation laws" and provides (p. 59, lines 5-7) that sales to entrymen for farm units shall be at the rate of \$1.50 per acre. Administration of this section would be greatly facilitated if the words "reclamation and public land laws" were substituted for "homestead and reclamation laws" at the place just mentioned and if for the text of the present proviso there were substituted "That the sale or other disposition of such lands shall be at rates and upon terms and conditions approved by the Secretary of the Interior." The latter amendment is recommended in order that the disposition of the lands may be based upon, among other things, the value of the property at the time the lands are sold or otherwise disposed of. It is anticipated that this will extend over a considerable period of time.

Section 6 of the bill, on page 60, provides that it shall not become effective until the Shoshone and Arapahoe Tribes consent to the terms and conditions of its sections 1, 4, and 5. I am advised that by Resolution No. 338 adopted July 24, 1952, the tribes have indicated their view that they should have an opportunity to reconsider the proposed settlement in the light of then existing land values if the bill is not enacted on or before June 30, 1954. In view of this, I recommend that there be substituted for the present text of section 6 the following:

"Should this Act become law subsequent to June 30, 1954, there is hereby reserved to the Shoshone and Arapahoe Tribes the privilege of rejecting, within 120 days after the date of the Act, the terms and conditions of its sections 1, 4, and 5. If those terms and conditions are rejected, no part of the Act shall become effective."

In addition to the amendments already recommended, I suggest the following for the sake of clarity.

Page 1, line 8, delete the comma and the word "which", and insert in lieu thereof a period and the word "Said".

Page 1, line 8, insert: "credited to and" after the expression "which sum shall be".

Page 1, line 9, for the phrase "by law", substitute "by the Act of May 19, 1947 (61 Stat. 102), as amended by the Act of August 30, 1951 (65 Stat. 208) and by the Act of July 17, 1953 (Public Law 132, 83d Congress)".

Page 59, line 24, delete "in like manner and".

Page 60, line 1, delete "1130", and insert in lieu thereof "1128".

Page 60, line 4, after the word "purposes" insert: "*Provided*, That the compensation authorized in section 1 hereof shall also be deemed to release the United States from any and all claims for damages whatsoever arising out of withdrawal of lands herein restored to tribal ownership".

Page 60, line 7, delete "joint".

Page 60, line 9, for the phrase "by law" substitute "by the Act of May 19, 1947 (61 Stat. 102), as amended by the Act of August 30, 1951 (65 Stat. 208) and by the Act of July 17, 1953 (Public Law 132, 83d Congress)".

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours.

ORME LEWIS,
Assistant Secretary of the Interior.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington 25, D. C., July 3, 1953.

Hon. HUGH BUTLER,
*Chairman, Committee on Interior and Insular Affairs,
United States Senate, Senate Office Building,
Washington 25, D. C.*

MY DEAR MR. CHAIRMAN: This will acknowledge your requests for the views of the Bureau of the Budget on S. 273, S. 1077, and H. R. 4483, bills to provide compensation to the Shoshone and Arapahoe Tribes of Indians for certain lands of the Riverton reclamation project within the ceded portions of the Wind River Indian Reservation, and for other purposes.

These bills would provide compensation to the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation in Wyoming for approximately 161,500 acres of land which the Indians relinquished to the Federal Government for reclamation purposes, and would authorize the disposal of such lands after the Indian interest is liquidated.

On March 31, 1953, the Department of the Interior reported to the House Committee on Interior and Insular Affairs on H. R. 3476. Following hearings by that committee with departmental and other witnesses H. R. 4483 was introduced with clarifying amendments. In particular, it eliminated an objectionable provision for the sale of lands at \$1.50 per acre by requiring (p. 59, lines 12-15) that payments for lands disposed of shall be not less than \$6.25 per acre, the amount proposed to be paid to the Indians for their interest in the land.

This office has no objection to the enactment of H. R. 4483.

This report should also be considered as an expression of our views on the Senate bills referred to above.

Sincerely yours.

ROWLAND HUGHES,
Assistant Director.

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington 25, D. C., May 11, 1953.

HON. ARTHUR V. WATKINS,
*Chairman, Subcommittee on Indian Affairs,
Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D. C.*

MY DEAR SENATOR WATKINS: At the conclusion of the hearings May 6 in connection with H. R. 4483 you requested that we advise you regarding the effectiveness of certain language tentatively adopted by the committee as a substitute for the last proviso of section 2 of said bill to assist settlers on the Riverton project. Without commenting on the merits of the object to be accomplished but solely in order to furnish technical advice to the committee, it is suggested that the following language be substituted for said present proviso appearing at lines 14 and 15 of page 59 of said bill: "*Provided further, That the average price for all such lands disposed of by sale shall be not less than \$6.25 per acre.*"

This language is substantially similar to the amendment proposed by Senator Barrett.

Sincerely yours,

G. W. LINEWEAVER,
Assistant Commissioner.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES, EX REL. THE SHOSHONE IN-
DIAN TRIBE AND THE ARAPAHOE INDIAN
TRIBE OF THE WIND RIVER RESERVATION IN
WYOMING, ROBERT N. HARRIS, A MEMBER OF
THE SHOSHONE TRIBE, AND NELLIE F. SCOTT,
A MEMBER OF THE ARAPAHOE TRIBE, FORT
WASHAKIE, WYOMING,

Appellants,

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR,

Appellee

Appeal from an Order of the United States District Court
for the District of Columbia Dismissing the Complaint

APPELLANTS' REPLY BRIEF

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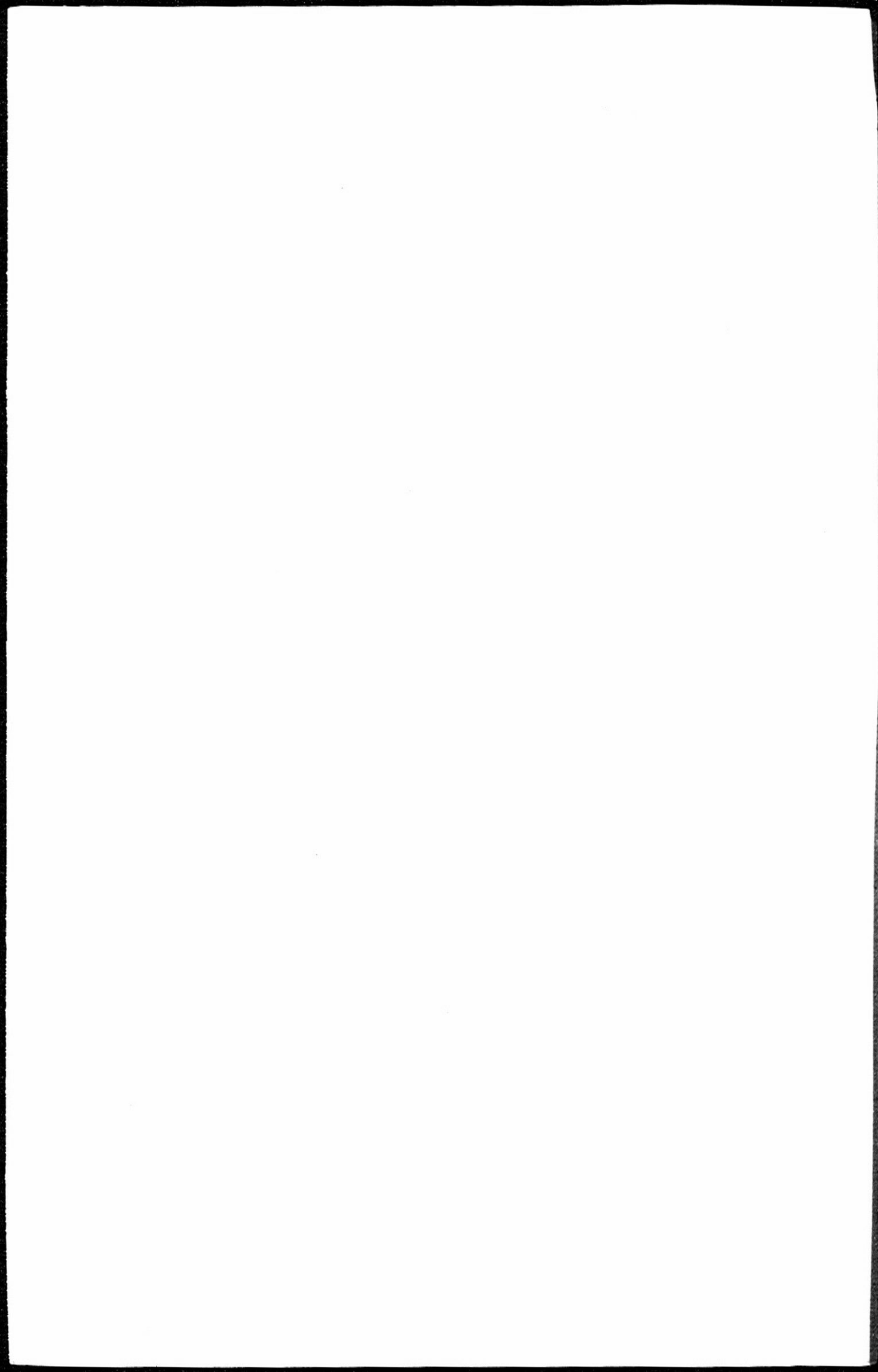


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<i>H. E. Christensen</i> , Montana 01061 (February 19, 1951) (Gowers, BLM-1951-15)	3
<i>Ernest A. Hanson</i> , Las Cruces 069760 (October 5, 1951) (Gowers, BLM-1951-73)	3
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<i>Donald M. Snow</i> , BLM-A 03928 (January 17, 1957) (Gowers, BLM-1957-18)	3
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,634

UNITED STATES, EX REL. THE SHOSHONE IN-
DIAN TRIBE AND THE ARAPAHOE INDIAN
TRIBE OF THE WIND RIVER RESERVATION IN
WYOMING, ROBERT N. HARRIS, A MEMBER OF
THE SHOSHONE TRIBE, AND NELLIE F. SCOTT,
A MEMBER OF THE ARAPAHOE TRIBE, FORT
WASHAKIE, WYOMING, *Appellants,*

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR,
Appellee

**Appeal from an Order of the United States District Court
for the District of Columbia Dismissing the Complaint**

APPELLANTS' REPLY BRIEF

I

The salient point in the case is ownership of the oil and
gas. The Mineral Leasing Act of 1920 applies only to oil

and gas deposits "owned by the United States" (30 U.S.C. 181). It has never been applied to any other land.¹

The Secretary does not meet this point. He makes no reference whatsoever to the holdings of his Department, both before and since he held against the appellants, that land is not "owned by the United States" unless the United States has the unrestricted right to use or dispose of the proceeds from the land. Where the Indians are entitled to the proceeds, the land is not subject to oil and gas leasing under the Mineral Leasing Act of 1920.

With respect to part of the very land in suit, the Secretary in 1950 held "that the phrase 'lands * * * owned by the United States', as used in the Mineral Leasing Act, is at least limited to lands *in which all rights are held by the United States, including the unrestricted right to use or dispose of any proceeds derived from such lands*" (emphasis supplied). *Florence E. Gallivan*, 60 I.D. 417, 419 (1950).

Again in *Charles B. Gonzales*, A-26551 (January 23, 1953), the Secretary reiterated what was held in the *Gallivan* case and added, "where the beneficial interest in lands is vested in Indians who are entitled to receive the proceeds that may be derived from the use of such lands, the Mineral Leasing act does not apply to those lands."

The rule of the *Gallivan* case has been consistently followed in the Department. Applications for oil and gas leases under the Mineral Leasing Act of 1920 are denied where the Indians and not the United States have the rights to the proceeds. *Edward M. Brown*, A-26523 (December

¹ The Secretary refers to the Mineral Leasing Act for Acquired Lands as an example of where Congress extended the mineral leasing laws "to other than public lands" (Appellants' Br., 7), leaving the inference that "other than public lands" means lands not owned by the United States. Of course, this is erroneous. The Mineral Leasing Act of 1920 (30 U.S.C. 181) and the Mineral Leasing Act for Acquired Lands (30 U.S.C. 352) apply only to lands "owned" by the United States. In one case, the United States owns public lands; in the other, it owns lands purchased or acquired from private ownership.

11, 1952) (Gowers, SO-1953-9); *W. B. Minturn, et al.*, BLM Montana 012925, etc. (February 7, 1956) (Gowers, BLM-1956-38); *Grace F. Holbeck*, BLM Montana 014222 (March 20, 1956) (Gowers, BLM-1956-52); *Cynthia True*, BLM Montana 019683 (November 16, 1956) (Gowers, BLM-1957-5).

Here, the Tribes own 90% of the proceeds derived from the land. In fact, they own 100% but 10% is allowed for administrative expenses. The money does not belong to the United States. The Secretary cannot and does not square the Tribes' right to the proceeds with his rule so consistently applied in all cases but this one—that, unless the United States has the unrestricted right to the proceeds, the oil and gas are not owned by the United States and therefore are not subject to the Mineral Leasing Act of 1920.

II

The word "bonuses" in section 5 of the 1953 Act has no meaning unless competitive bidding was contemplated (Appellants' Br., 40). The Secretary realizes the word "bonus" must be explained away. He asserts that we are wrong when we say that, if the Secretary's decision stands, there can be no bonuses (Appellee's Br., 8-9).

It is the Secretary who is wrong. First, he takes the view that bonuses are paid "if at the time of leasing the land is within a known geologic structure of a producing oil or gas field" (Appellee's Br., 9). It is the time the *application* for a lease is filed that controls, not the time of leasing as erroneously stated by the Secretary.²

² This is the established rule in the Department of the Interior. *George C. Vournas*, 56 I.D. 390, 393 (1938); *Donald M. Snow*, BLM-A 03928 (January 17, 1957) (Gowers, BLM-1957-18); *Joanna D. Hoefle*, Montana 017086, 015657 (December 19, 1956) (Gowers, BLM-1957-17); *Ernest A. Hanson*, Las Cruces 069760 (October 5, 1951) (Gowers, BLM-1951-73); *H. E. Christensen*, Montana 01061 (February 19, 1951) (Gowers, BLM-1951-15).

Second, the Secretary concludes that, at the time the Act of August 15, 1953, "was passed it was quite reasonable to assume" that some of the lands were on the known geologic structure of a producing oil or gas field (Appellee's Br., 9). This is erroneous. On August 15, 1953, when the Act was passed, there was no producing oil or gas field. There is none yet. The land is *believed* but not *known* to contain oil or gas. There is no basis whatsoever for appellee's retroactive guess that in 1953 it was reasonable to assume some of the lands were on the known geologic structure of a producing oil or gas field.

Third, the Secretary advances the novel thesis that, if the existing noncompetitive leases expire because there is no production, "the possibility of bonuses is not gone forever" (Appellee's Br., 9). Apart from the fact that this small promise conveniently ignores the fact that all the land has already been leased without bonuses, the proposition is self-contradictory. If there is no production, how can the land be on the known geologic structure of a *producing* oil or gas field, the *sine qua non* of competitive bidding?

The truth is that the word "bonuses" in section 5 meant a continuation of leasing by competitive bid regardless of whether the land is in a known geologic structure of a producing oil or gas field. This could be accomplished only under the 1916 Act or the other statutes governing the leasing of Indian oil and gas land.

III

In our opening brief, we drew attention to numerous statutes using the broadest and most comprehensive words of grant and conveyance possible. Despite such language, the courts have held that the Indians remained the beneficial owners because the proceeds from the land belonged to them (Appellants' Br., 19-28). To divert attention from

his failure to answer, the Secretary sets up and proceeds to tear down his own "straw" argument that the appellants are challenging the power of Congress to extinguish title to the oil and gas (Appellee's Br., 11-13). We do not challenge the power. We say it was not exercised. Nothing short of explicit language can make the Mineral Leasing Act of 1920 apply to oil and gas *not* owned by the United States. No such language is found in the 1953 Act.

IV

The Secretary "was under a duty to act in harmony with the Government's position as a fiduciary * * *." *Menominee Tribe of Indians v. United States*, 101 C.Cls. 10, 21 (1944). Therefore, an interpretation resulting in diminishment of income is in violation of the law unless mandatorily compelled. In his administrative decision, the Secretary was unable to offer any reason why the Tribes should give up potential bonuses and higher rentals. His counsel here recognizes the deficiency and seeks to supply it. Before this Court, the argument is made that, after all, free leasing, no bonuses and nominal rents, are better for the Tribes. Now the speculation is advanced that, in the long run, this might provide a greater return than calling for competitive bids with bonuses (Appellee's Br., 14).

This amounts to saying that the Tribes are better off giving up their bonuses (\$664,171 up to March 31, 1953), plus \$1.25 per acre rent, in return for leases carrying a rent of 50 cents per acre for the first year, free rent the second and third years, and 25 cents per acre the fourth and fifth years—an average of 20 cents per year per acre (Appellants' Br., 9-10).

When leases are virtually given away as they are under the Mineral Leasing Act of 1920, lessees take the leases for speculation in the hope of deriving bonuses. Generally, the

initial lessee does not take the lease to drill. There is no compulsion on him to drill. He has no investment to speak of. The first three years all together cost only 50 cents per acre. If the speculator-lessee fails to sell his lease at a profit, he abandons it without charge (30 U.S.C. 187b). The cost to him is nominal. The Secretary knows this; that is why he did not and would not himself advance the argument presented to this Court by his counsel. Obviously, where a bonus is paid and a substantial investment is at stake, there is compulsion to drill in an effort to obtain a return on the investment. And, regardless of whether oil is produced, the Tribes would have the bonus. State lands are always leased by competitive bidding. The bonus practice is universally followed in private transactions. Congress, for reasons of national policy, surrenders any right to bonuses unless public land is *known* to contain oil or gas. But this does not make it good business for private landowners, including the Tribes, or any one else to do the same.

If the policy of noncompetitive leasing is good for the Shoshone and Arapahoe, as suggested by counsel, we should expect the United States to adopt it for all other Indian tribes and for itself when the opportunity is presented. If the argument of counsel is correct, the policy of the United States requiring public auction of oil and gas leases for all Indian land is wrong. If counsel is right, why should the United States insist that the "no bonus" policy is best for these two Tribes but not for the United States on the outer continental shelf? (See section 8 of the Act of August 7, 1953, 67 Stat. 462, 468, 43 U.S.C. 1337).

In the development of the outer continental shelf, the way was open for the leasing of some 262,500 square miles of "wild cat" territory (Joint Hearings, etc., on S.1988 and similar House bills, 80th Cong., 2d sess. (February 23-March 18, 1948), p. 734). But the Secretary refused to fol-

low the economic course he now suggests for the Tribes. He insisted on competitive leasing (Hearings before the Senate Committee on Interior and Insular Affairs on S.1901, 83d Cong., 1st sess., pp. 688, 692). A very small portion of the continental shelf was offered at public auction. About one half of one per cent of the land (1,350 square miles) brought in bonuses of \$252,141,077.02, as was so proudly announced by the Department of the Interior's press release of August 26, 1955 (see also Secretary's "communication" in the March 10, 1956, edition of the *Washington Post*, p. 15). Following counsel's rationale, we are sure every acre of the continental shelf would be covered with leases if the Government were offering them on a noncompetitive basis.

At one time, the Secretary had authority to lease by competitive bidding public lands "believed", as distinguished from lands "known", to contain oil or gas (Act of August 21, 1935, c. 599, sec. 1, 49 Stat. 676, amending section 17 of the Mineral Leasing Act of 1920). This authority was taken from him by the Act of August 8, 1946, c. 916, sec. 3, 60 Stat. 951 (30 U.S.C. 226). But it was done over his protest. He did not advance any such argument as his counsel here offers the Court. The Secretary's representative testified (Hearings, Senate Committee on Public Lands, S. 1236, 79th Cong., 2d sess. (1946), Serial 105157, p. 254):

The present law is broader and includes lands known or believed to contain oil or gas. * * * *I see no reason why the United States should make a free grant of the right to lease land reasonably believed to contain oil or gas* * * * [emphasis supplied].

Likewise, when the companion measure was before the House Committee on Public Lands, the Secretary, by a

letter of May 9, 1946, informed the Chairman (Hearings, H. R. 3711, 79th Cong., 2d sess., May 14, 1945 (Serial 105600), p. 3):

* * * Conferring upon the Secretary authority to lease by competitive bidding lands known or *believed* to contain oil or gas affords sufficient latitude to sell competitively to the highest bidder lands which, although technically unproved, are recognized by geologists as valuable for oil or gas [emphasis supplied].

The Secretary was right. There is no reason for making a free grant of oil and gas leases when the market is willing to pay. It takes no financial wizard to figure out that a landowner can have both bonuses and royalties. Bonuses are paid regardless of whether there is oil. They are paid for the right to drill and produce oil if it is present. Large investments in bonuses provide the strongest compulsion to drill, as the only means of recovering the investment. If no oil is found, the landowner still has the bonus reward. On the other hand, nominal rentals encourage the leaseholder to hold for speculative reasons in the hope he can sell at a bonus or, failing in that, to abandon the leases. To counsel for the Secretary, this is a paper problem. He may have overlooked the point that, once there is production, adjoining land becomes immeasurably more valuable bonus-wise, and there is production on some of the land subject to the 1953 Act. But, if the land is already covered by a free lease, the bonus goes to the lessee who paid 50 cents per acre for three years' rental.

We realize the relative economic merits of competitive versus noncompetitive leasing do not control the case. They do point up the weakness of the Secretary's position

when he is forced to take up the cudgels in support of an economic theory rejected by the industry and himself.

Respectfully submitted,

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